No. 77-1254

In the Supreme Court of the United States

OCTOBER TERM, 1977

CYRUS R. VANCE, SECRETARY OF STATE,
ET AL., APPELLANTS
v.
HOLBROOK BRADLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

WADE H. McCREE, JR.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

HERBERT J. HANSELL,
Legal Adviser,
Department of State,
Washington, D.C. 20520.

MICHAEL A. GLASS,
General Counsel,
United States Information Agency,
Washington, D.C. 20547.

INDEX

CITATIONS

257-048—78——1

In the Supreme Court of the United States

OCTOBER TERM, 1977

No.

CYRUS R. VANCE, SECRETARY OF STATE,
ET AL., APPELLANTS

v.

HOLBROOK BRADLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A–8A) is reported at 436 F. Supp. 134. A prior opinion of the district court (App. D, *infra*, pp. 13A–24A) is reported at 418 F. Supp. 64.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 9A–10A) was entered on October 14, 1977. A notice of appeal to this court (App. C, *infra*, p. 11A) was filed on November 10, 1977. On December 28, 1977, the Chief Justice extended the time for docketing the

appeal to and including February 8, 1978, and on January 31, 1978, Mr. Justice Brennan further extended the time to and including March 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31–32.

QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, which requires persons covered by the Foreign Service Retirement System to retire at age 60, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

2. Section 632 of the Foreign Service Act of 1946, 60 Stat. 1015 as amended, Pub. L. 94–350, 90 Stat. 846, 22 U.S.C. (1976 ed.) 1002 provides:[1]

> Any participant in the Foreign Service Retirement and Disability System, other than one occupying a position as chief of mission or any other position to which appointed by the President, by and with the advice and consent of the Senate, who is not a career ambassador shall be retired from the Service at the end of the month in which the participant reaches age sixty and receive retirement benefits in accordance with the provisions of section 821, but whenever the Secretary shall determine it to be in the public interest, such a participant may be retained on active service for a period not to exceed five years. Any such participant who completes a period of authorized service after reaching age sixty shall be retired at the end of the month in which such service is completed.

[1] After this litigation began, but before the district court issued its final decision, Section 632 was amended by the Foreign Service Retirement Amendments of 1976, Pub. L. 94–350, 90 Stat. 846. The present version of Section 632, set forth here, does not differ in any material respect from the previous version.

STATEMENT

Appellees are six former and four current Foreign Service employees in either the Department of State or the United States Information Agency, and an organization representing such employees. They filed this suit to challenge the validity of Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. (1970 ed.) 1002. Appellees contended that the requirement that Foreign Service employees retire at age 60 violated their rights under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq.* ("ADEA"), the Due Process Clause of the Fifth Amendment, Executive Order No. 11141, 3 CFR. 179 (1964), and applicable Civil Service Commission regulations. Appellees sought declaratory and injunctive relief against continued enforcement of the mandatory retirement provision. They also sought back pay and reinstatement.

The district court dismissed the primary non-constitutional claims, including the ADEA claim, on June 30, 1976 (App. D, *infra,* pp. 13A–24A). Appellees then abandoned their remaining non-constitutional claims. A three-judge district court was convened to consider the constitutional arguments.[2]

In response to appellants' motion for summary judgment, appellees argued that decision of the constitutional question required the presentation of evidence to show that there was no rational basis for distinguishing between Foreign Service employees, who must retire at age 60, and Civil Service employees, who may continue to work until age 70. Appellants contended that the constitutional issue was a question of law that could be disposed of without an evidentiary hearing. Although appellees never formally moved for summary judgment, the district court treated the case as if it had been submitted on cross motions for summary judgment.[3]

On the basis of affidavits from both sides and submissions in response to the court's request for supplementation of the record, the court declared the mandatory retirement provision of the Foreign Service Act unconstitutional (App. A, *infra,* pp. 1A–8A). The court acknowledged that "the distinction between

[2] Because this suit was filed before August 12, 1976, it is not affected by Pub. L. 94–381, 90 Stat. 1119, which repeals most provisions requiring three-judge district courts.

[3] During the hearing before the three-judge court, Judge Gesell and Judge Robb questioned counsel at some length about appellees' willingness to submit the case on the record as it then stood. The colloquy (Tr. 40–46) is less than pellucid, but it is plain that counsel for appellees did not formally request summary judgment.

Civil Service and Foreign Service employees is proper if there is a rational basis to support it" (*id.* at 3A). It concluded, however, that "[o]n the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (*id.* at 3A–4A).

The court did not discuss the legislative history of the mandatory retirement provision. It considered, instead, the limited record evidence, measuring the proffered justifications for the challenged classification against the court's own assessment of the employment conditions of Foreign Service and Civil Service employees.

The court found that "less than ten percent of the American civilians who work overseas for the Government are forced to retire at age sixty" (App. A, *infra,* p. 5A). It also determined that many of the overseas personnel not subject to early retirement have jobs similar to those of Foreign Service personnel and may be stationed in hardship posts. Finally, the court found that many Civil Service personnel spend significant portions of their careers abroad. The court concluded that a system under which some federal employees working abroad are "singled out" for early retirement is "patently arbitrary and irrational" (*id.* at 8A).[4] The court directed appellants to cease

[4] Under the impression that appellees also had challenged the constitutionality of mandatory retirement at age 70, the court rejected that argument in a footnote to its original opinion (App. A, *infra,* p. 3A n. 4). On being informed by appellees that no such challenge had been intended, the court struck all but the first sentence of footnote 4 (order of July 28, 1977).

257-048—78——2

enforcing retirement at age 60 and to reinstate the individual appellees who had been involuntarily retired (App. B, *infra,* p. 10A).

THE QUESTION IS SUBSTANTIAL

The distinction between the mandatory retirement ages applicable to the Foreign Service and the Civil Service has existed for more than 50 years, and there is a rational basis for that distinction. The district court therefore erred in finding that distinction unconstitutional.

1. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, held that mandatory retirement statutes must be upheld if they have a rational basis. The court sustained a state law requiring uniformed state police officers to retire at age 50. It explained (427 U.S. at 315–316; footnote omitted):

> Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective. * * *
>
> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams,* 397 U.S., at 485.

A similar rational basis supports the distinction between the mandatory retirement ages applicable to the Foreign Service and the Civil Service.

Congress created the distinction in 1924, when it created the Foreign Service.[5] In 1920 Congress enacted the first general retirement system for federal employees. The statute established a mandatory retirement age of 70 for most Civil Service employees who had rendered at least 15 years of service.[6] Employees in the Diplomatic and Consular Services were not included. When Congress subsequently decided to reorganize the Diplomatic and Consular Services into a single Foreign Service, one of the most important goals of the reorganization effort was the creation of a retirement system for Foreign Service Officers. See H.R. Rep. No. 157, 68th Cong., 1st Sess. 7, 10, 16, 18 (1924); Hearings on H.R. 17 and H.R. 6357 before the House Committee on Foreign Affairs, 68th Cong., 1st Sess. 15, 127, 165–166 (1924).

---

[5] Act of May 24, 1924, 43 Stat. 140.

[6] Act of May 22, 1920, 41 Stat. 614. The mandatory retirement of Civil Service employees at age 70 was sustained against a constitutional challenge in *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D. D.C.), summarily affirmed, 420 U.S. 940.

The 1924 act establishing this system fixed the age of retirement for Foreign Service Officers at 65.[7] The principal sponsor of the 1924 legislation explained that the reason for requiring Foreign Service Officers to retire five years before Civil Service employees was that Foreign Service Officers, like military personnel but unlike Civil Service employees, commonly were assigned to remote posts overseas and experienced difficult and unsettling changes in their modes of life. See, *e.g.*, 65 Cong. Rec. 7564–7565 (1924).[8]

The 1924 Act has been amended several times, but Congress has adhered to its determination that Foreign Service Officers should be required to retire at a lower age than civilian employees generally. In 1941, for example, Congress conferred discretionary power on the Secretary of State to compel the retirement at full pension of Foreign Service Officers who were at least 50 years old and had rendered 30 years' service, or to compel the retirement at partial pension of Officers who were at least 50 and had rendered 15 years' service (55 Stat. 189). This provision has since been repealed (60 Stat. 1038), but its legislative history demonstrates Congress' consistent assessment of the effects of overseas work on Foreign Service

[7] "When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service he shall be retired: *Provided*, That the President may in his discretion retain any such officer on active duty for such period not exceeding five years as he may deem for the interest of the United States." 43 Stat. 144.

[8] Some members of Congress sought to raise the retirement age for Foreign Service Officers to 70, but an amendment to do so was defeated. 65 Cong. Rec. 7586 (1924).

Officers. Both the House and Senate committee reports reprinted a letter from Secretary of State Hull, which stated (S. Rep. No. 168, 77th Cong., 1st Sess. 2 (1941); H.R. Rep. No. 389, 77th Cong., 1st Sess. 3 (1941)):

> Whereas it is well known that in all walks of life the age at which different individuals no longer find it possible to continue their maximum volume of work and activity, or to carry heavy responsibility with effectiveness, varies materially, experience has shown that the continued strain of 30 years or more of service representing this Government in foreign countries in widely different climates and environments makes it desirable both from the standpoint of the Government and of officers that retirements should be authorized by law, commencing at a minimum of 50 years of age. * * * [T]he Foreign Service is in many respects the most hazardous of the permanent commissioned services of this Government, when this country is not actually engaged in war. Foreign Service officers and their families are, even when the United States is at peace, not only subject to unhealthful conditions and extremes of climate (often without having suitable medical facilities available) but they are also subject to all the dangers of foreign wars, of civil strife in foreign countries, and of major catastrophes. * * *

The perils and discomforts to which Foreign Service Officers were exposed in 1941 have not appreciably diminished since then. American diplomatic missions have been established in an increasing number of disadvantaged countries, and the threat of terrorist ac-

tivity has grown in many areas. See Affidavit of Arthur Wortzel, pp. 3–5; Letter from Director General of Foreign Service to Civil Service Commission.

In 1946 Congress created a "selection-out" procedure for the Foreign Service.[9] Officers are ranked in "classes" and required to retire if they do not secure promotion ~~class~~ within a specified number of years. This system is designed to "force attrition in a career service at a more rapid rate than is achieved by ordinary retirements" in order to guarantee "that Foreign Service officers shall be promoted by selection on the basis of merit."[10] Under the 1946 statute, career ministers remained subject to mandatory retirement at age 65.[11] All other Officers were required to retire at age 60, an age that corresponded to the approximate age projected for the most senior Officers in Class 1, the rank immediately below career minister.[12] Class 1 Officers were not subject to selection-out, because the mandatory retirement provisions were expected to accomplish the desired result of ensuring turnover in that class.[13]

[9] Foreign Service Act of 1946, 60 Stat. 1015.

[10] H.R. Rep. No. 2508, 79th Cong., 2d Sess. 85 (1946).

[11] In the Foreign Service Retirement Amendments of 1976, Pub. L. 94–350, 90 Stat. 846, the mandatory retirement age for career ministers was lowered to 60.

[12] H.R. Rep. No. 2508, 79th Cong., 2d Sess. 92 (1946).

[13] *Id.* at 91. Class 1 officers were made subject to selection-out in 1955 (69 Stat. 25). In 1955 Congress also created a new class of Foreign Service Officers called "career ambassadors," one rank above career ministers. The mandatory retirement age for career ambassadors was fixed at 65 (69 Stat. 537).

The fact that selection out now applies to ~~career ministers and~~ Class 1 Officers does not detract from the validity of the congressional determination that retirement at age 60 should be required throughout the Foreign Service Retirement System. As the legislative history demonstrates, that decision was based on the characteristics of career service abroad in many different countries that vary widely in technological development, culture, climate, and attitude toward the United States. Those conditions affect the optimum career length of all Foreign Service employees, not only those near the top of the Foreign Service Officer ladder.

Between 1946 and 1976 Congress extended the coverage of the Foreign Service Retirement System.[14] In doing so, it periodically reaffirmed its earlier conclusion that mandatory retirement of Foreign Service employees should come at an earlier age than mandatory retirement of Civil Service employees. For example, in 1960, when a large group of technical, administrative, fiscal, clerical, and custodial employees of the Foreign Service were transferred into the Foreign Service Retirement System, Congress noted that this system is designed to give recognition to the need for earlier retirement age for career Foreign Service personnel who spend the majority of their working years outside the United States adjusting to new working and living conditions every few years."[15] Similar commentary is contained in a 1966 Cabinet Committee study of federal staff retirement systems,

[14] 74 Stat. 838, 82 Stat. 812, 814; 87 Stat. 722–723; Pub. L. 94–350, 90 Stat. 834. Under these acts, the great majority of employees in the Foreign Service of the State Department, the United States Information Agency, and the Agency for International Development, are entitled to benefits under the Foreign Service Retirement System. Not all persons in the newly-covered groups are subject to selection-out, but the Congressional purpose of requiring retirement at age 60 remains valid.

[15] H.R. Rep. No. 2104, 86th Cong., 2d Sess. 31 (1960).

submitted to Congress as an appendix to the annual report of the Bureau of the Budget and the Civil Service Commission on federal statutory salary systems. S. Doc. No. 14, 90th Cong., 1st Sess. (1967). That study states (*id.* at 112):

> The mandatory retirement age of 60 is set in recognition of the need to maintain the Foreign Service as a corps of highly qualified individuals with the necessary physical stamina and intellectual vitality to perform effectively at any of some 300 posts throughout the world including those in isolated, primitive, or dangerous areas. Retirement at age 60 also enhances the advancement opportunities of the most effective younger personnel and reduces the strain on the selection-out program.

Congressional recognition of the special stresses of an overseas career is also reflected in the decision to extend the Foreign Service Retirement System to career Foreign Service employees of the United States Information Agency in 1968 and the Agency for International Development in 1973. The House report on the latter measure declared that the Foreign Service Retirement System "provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service." [16]

2. Congress thus had a rational basis for concluding that Foreign Service personnel should have a mandatory retirement age, and the decision to place that age at 60 is no more objectionable than the decision

[16] H.R. Rep. No. 93–388, 93d Cong., 1st Sess. 46 (1973).

of Massachusetts, upheld in *Murgia,* to set the age of 50 for state police officers' retirement. Increasing age brings with it increasing susceptibility to physical difficulties, and the fact that the individual appellees may be able to perform their tasks is no more dispositive here than in *Murgia.* The use of a mandatory retirement age "rationally furthers some legitimate, articulated state purpose" (*McGinnis* v. *Royster,* 410 U.S. 263, 270)—or so Congress was entitled to conclude. Disagreement with a legislative conclusion of this sort is not a reason to set aside a statute. See *Whalen* v. *Roe,* 429 U.S. 589; *Weinberger* v. *Salfi,* 422 U.S. 749.

The district court thought, however, that the equal protection component of the Due Process Clause precludes Congress from providing one retirement age for civil service employees and another retirement age for Foreign Service employees.[17] At least two bases strongly support Congress' choice, however.

[17] In September 1977, the House of Representatives passed H.R. 5383, a bill that would repeal the mandatory retirement age of 70 for Civil Service employees. See 123 Cong. Rec. H9985 (daily ed., September 23, 1977). This bill does not affect Foreign Service employees ~~Officers~~. The bill originally introduced in the House would have eliminated the mandatory retirement age for all federal employees, but the proposed legislation was restricted to Civil Service employees by an amendment adopted after the Chairman of the House International Relations Committee asked to conduct a separate review of the problems of the Foreign Service and stated that the committee would "review the retirement provisions affecting the Foreign Service at the earliest possible date" (*id.* at H9969 (remarks of Rep. Zablocki)). In October 1977, the Senate passed a different version of H.R. 5383, 123 Cong. Rec. S17303 (daily ed., October 19, 1977), and the bill is currently in conference.

257-048—78——3

a. The Foreign Service is unique in the worldwide mobility of *all* of its employees. They must be ready to serve anywhere and are required by law to devote a substantial part of their careers to overseas duty. Approximately 60 percent of all Foreign Service employees are overseas at any given time.[18] Under Section 571 of the Foreign Service Act, 22 U.S.C. (1970 ed.) 961, Foreign Service employees may be assigned to domestic posts for more than eight consecutive years only on the personal decision of the Secretary of State. Foreign Service employees must be on call to relocate, to hazardous places, at a moment's notice. They are expected to serve in hardship posts, and they do not have the luxury of taking hardship duty on their own terms.

There is no similar presumption that persons in any of the employment categories cited by the district court will serve overseas for extended periods. Peace Corps volunteers typically are not career employees. The Foreign Agricultural Service has only a few employees overseas, and they serve abroad at their option.[19] Similarly, persons who work for the Agency for International Development on a contract basis have no career obligations and are not required to re-

[18] Defendants' Response to Request for Information, Exh. 5.

[19] 286 Department of Agriculture employees were located in foreign countries in 1975; only 80 of these were in hardship posts. Defendants' Supplementary Memorandum With Respect to Defendants' Response to Request for Information. 4,611 participants in the Foreign Service Retirement System were abroad in 1975 (Defendants' Response to Request for Information, Exh. 5).

main overseas for longer than the contract period. Approximately 30,000 Civil Service employees work overseas for the Department of Defense, but departmental regulations limit the overseas tenure of these employees to five years.[20] The percentage of Civil Service employees overseas at any given time is minuscule.

The most that can be said, we think, is that Congress would have had a good reason to require Civil Service employees who spend significant portions of their careers abroad to retire at 60. But that would have created awkward problems for the administration of the Civil Service and its retirement system, and Congress is not constitutionally required to prescribe a special retirement age for these employees in order to be able to deal effectively with the Foreign Service. Congress may attend to the special problems facing the Foreign Service without imposing similar measures everywhere else they may be desirable or appropriate. See *Califano* v. *Jobst,* No. 76–860, decided November 8, 1977, slip op. 10–11; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489.

b. The Foreign Service employs only a small part of the entire civilian workforce of the federal government. But this workforce experiences special problems in addition to its overseas service. Unlike Civil Service employees, who may transfer from one agency to another and from the federal government to comparable jobs with private employers or state governments, Foreign Service employees (like military offi-

[20] Department of Defense Instruction 1404.8 (1968).

cers) cannot easily transfer to other employment, because there is no comparable employment. The Foreign Service deals with a special problem—the foreign affairs of the United States. The Foreign Service therefore employs a special corps of persons, who enter the Service during their youth and remain with it for substantial periods. There is little lateral mobility.

Because of this feature of the Foreign Service career, it has been necessary to use for some categories of employees a selection out program to winnow those who are not best qualified to assume additional responsibilities. The winnowing process allows new persons to enter the Foreign Service. The military, because of its similar career structure, also has a selection-out program. See *Schlesinger* v. *Ballard,* 419 U.S. 498. But selection-out does not apply to all employees, and even when applicable it is not fully effective for persons who have been consistently advanced in the past and have reached high positions. Selection-out for senior Foreign Service Officers may appear to be too ruthless for effective use, and the mandatory retirement age acts in some cases as an automatic selection-out by limiting the time any person may spend in his highest career post.[21] This use of a mandatory retirement age as a complement of a selection-out program

[21] "A mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and advance through the ranks." *Johnson* v. *Lefkowitz*, 566 F. 2d 866, 869 (C.A. 2) (upholding retirement of Civil Service attorneys at age 70).

is rational; Congress is not limited to one tool for dealing with the problems of management in a federal agency.

3. The district court's decision rests on the proposition that Foreign Service and Civil Service employment are so similar that Congress may not establish different pay and tenure rules. It therefore calls into question the congressional determination that the Foreign Service should follow different recruitment methods, promotion patterns, selection-out procedures, pay scales, and retirement programs. In other words, the district court's decision questions the constitutionality of legislation creating the Foreign Service, with its own combination of benefits and obligations.

Whenever Congress establishes a separate service,[22] there are bound to be some differences in the terms and conditions of employment between that service and the regular Civil Service. Promotion patterns will be different; pay will be different; retirement is likely to be different. The present case represents an attempt by some Foreign Service employees to improve their lot by eliminating a condition of employment that they see as less favorable than the comparable Civil Service rule, while retaining the conditions of employment that are more favorable than the comparable Civil Service conditions. This process could be extended indefinitely (perhaps with Civil Service

[22] In addition to the Foreign Service and the military services, the Postal Service, the Public Health Service, and several other special services have been established by Congress.

employees as plaintiffs in the next suit), until the terms and conditions of employment are the same.

Congress has indicated, however, that separate career ladders and separate terms and conditions of employment go hand in hand. Foreign Service pay is typically higher than Civil Service pay.[23] Similarly, foreign service retirement terms have been adjusted in conjunction with the imposition of a lower mandatory retirement age.[24] Unless it is possible to conclude that all of these distinctions are irrational—indeed, that the decision to make the Foreign Service a separate service is irrational—it is insupportable for the district court to have "corrected" the one condition to which appellees object without regard to the other conditions in the employment "package" that appellees enjoy. But, for the reasons we have discussed,

[23] Foreign Service pay ranges from $8,902 to $58,245 annually, whereas Civil Service pay ranges from $6,219 to $58,245. Executive Order No. 12010, 42 Fed. Reg. 52365 (1977). (Pursuant to 5 U.S.C. (1976 ed.) 5308, however, the pay actually received may not exceed $47,500). We have been informed by the Department of State that the proportion of Foreign Service officers in the two highest pay steps exceeds the proportion of Civil Service employees in the three highest pay steps.

[24] Foreign Service retirees receive an annuity computed at two percent of the highest average salary for three consecutive years, multiplied by the number of years of service; Civil Service retirees receive an annuity computed at 1½ percent of salary for the first five years of service, 1¾ percent for the next five years, and two percent for the remaining years. Compare 22 U.S.C. (1970 ed.) 1076 with 5 U.S.C. (1976 ed.) 8339(a). Foreign Service personnel with 20 years' service may elect to retire at age 50, but Civil Service employees with 20 years' service cannot normally retire until age 60. Compare 22 U.S.C. (1970 ed.) 1006 with 5 U.S.C. (1976 ed.) 8336. There are numerous other differences.

it was not irrational for Congress to conclude that the Foreign Service and the Civil Service should be treated differently in some respects.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys.

HERBERT J. HANSELL,
Legal Adviser,
Department of State.

MICHAEL A. GLASS,
General Counsel,
United States Information Agency.

MARCH 1978.

APPENDIX A

HOLBROOK BRADLEY ET AL., PLAINTIFFS

v.

CYRUS R. VANCE, SECRETARY OF STATE, ET AL., DEFENDANTS

Civ. A. No. 76-0085.

United States District Court,
District of Columbia

June 28, 1977

Before ROBB, *Circuit Judge,* and GESELL *and* FLANNERY, *District Judges.*

MEMORANDUM

PER CURIAM.

This case presents the question whether statutorily required retirement at age sixty for those persons covered by the Foreign Service Retirement System ("Foreign Service personnel") violates the equal protection guarantees embodied in the Fifth Amendment.[1] Plaintiffs are Foreign Service Officers who

[1] Plaintiffs originally had other claims which were presented to a single District Judge. The first, a contention that the mandatory retirement age violated the Age Discrimination in Employment Act, 29 U.S.C. § 633a, Executive Order 11141, 3 C.F.R. § 179, and Civil Service regulations, was dismissed on defendants' motion. 418 F. Supp. 64 (1976). A related claim was dismissed by Court Order on July 27, 1976, and a claim of discrimination in the application of the retirement age was dismissed by Stipulation of counsel on October 14, 1976.

were or will be forced into retirement at age sixty and an organization whose membership includes such officers. They seek declaratory and injunctive relief. This matter comes before the Court on defendants' motion to dismiss [2] or for summary judgment and plaintiffs' opposition thereto. At oral argument plaintiff cross-moved for summary judgment, but indicated that defendants could not prevail without supplementing the record. Defendants indicated a willingness for the case to be decided on the existing record. Following oral argument the parties were given an opportunity to submit additional evidence, and both sides did so.

Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. §1002, mandates retirement at age sixty for certain employees of the State Department, the United States Information Agency ("USIA"), and the Agency for International Development ("AID").[3] Generally, employees of the Federal Government need not retire at such an early age. Those employees covered by the Civil Service ("Civil

[2] Defendants initially argued that the Fifth Amendment does not apply because plaintiffs have no property interest and because they cannot challenge a portion of a statute under which they have received substantial benefits. These contentions have no merit.

[3] Any "participant" in the Foreign Service Retirement and Disability System, who is not a career ambassador or a chief of mission, must retire at age sixty unless the Secretary makes a special determination to waive retirement for five years. *See* 22 U.S.C. § 1002. Those "participants" are:

(1) Foreign Service Officers; (2) Foreign Service Reserve Officers with unlimited tenure (whether serving in State Department or USIA); (3) Foreign Service Information Officers; (4) Foreign Service Staff officers and employees with unlimited appointments (whether serving in State Department or USIA); and (5) Personnel serving in AID who have unlimited Foreign Service Reserve or Staff appointments or who are serving under Presidential appointment and meet certain other qualifications.

Service personnel") do not face mandatory retirement until age seventy. 5 U.S.C. § 8335. Plaintiffs claim that Congress has drawn an unlawful distinction by setting a lower retirement age for Foreign Service personnel than for Civil Service personnel.[4] Since neither "fundamental" rights nor "suspect" classes are involved here the distinction between Civil Service and Foreign Service employees is proper if there is a rational basis to support it. *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d (1973); *Mass. Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Thus the simple issue presented here is whether the conditions of Foreign Service work are sufficiently different from the conditions of Civil Service work so that the earlier retirement age is rational. *Cf. Murgia, supra* at n. 8. The application of the "rational basis standard" does not require, though, judicial abdication. It simply means that the legislatively drawn distinction is presumptively valid, and that its challengers have a heavy burden in proving its invalidity. On the record established in this case, the early mandatory retirement age for Foreign

[4] This claim raises an issue about the lawfulness of forced retirement between the ages of sixty and seventy, *i.e.*, the difference between the Civil Service and the Foreign Service. Plaintiffs also claim section 632 discriminates between those who have reached age sixty and those who are younger. This second claim raises an additional issue about the lawfulness of forced retirement at age seventy and above. Defendants have offered affidavit testimony that Foreign Service personnel are incapable of working effectively over age sixty. Plaintiffs have not sufficiently rebutted this testimony as to those persons age seventy and above to raise an issue of material fact. Thus defendants are entitled to summary judgment as to the second claim.

Service personnel cannot survive even this most minimal scrutiny.

The Government presents two explanations for the retirement age distinction. It first says that the mandatory retirement age is rationally related to its interest in creating advancement opportunities for younger people. However, an interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme. Furthermore, there is no obvious reason why such a rationale would not equally apply to the Civil Service, and defendants have presented none.

The second rationale is that Foreign Service personnel, unlike Civil Service personnel, tend to work overseas and they face, therefore, unusual physical and psychological difficulties. Sixty year olds are said not to have the vitality necessary to carry out overseas assignments, particularly in "hardship posts," due to the inherent effects of aging and the cumulative effects of a career spent in foreign lands. Furthermore, the Government contends that upon reaching age sixty people are more likely to need medical attention, which is often lacking in foreign posts.

The record compiled in this case conclusively establishes that Civil Service and other Government personnel work overseas in positions and locations comparable to those of Foreign Service personnel, without facing forced retirement at age 60. In 1976 there were over 58,000 American civilians working for the Government overseas. More than 38,000 were stationed in foreign countries, and about 20,000 were in the United States Trust Territories (*e.g.*, Panama, Samoa, Wake

Island).[5] Only 4,787 of these Government employees faced mandatory retirement at age sixty. Thus, less than ten percent of the American civilians who work overseas for the Government are forced to retire at age sixty.[6]

Not only are there substantial numbers of Americans working abroad not subject to early retirement; many of these people have jobs similar to those of Foreign Service personnel. The Foreign Service organizations (State Department, USIA, AID) had 7,792 American civilian employees working abroad in November, 1976. However, many of these employees have Civil Service status and the right to work until age seventy. In fact, almost forty percent of the Americans who work overseas for the Foreign Service agencies are subject to Civil Service retirement. In addition, AID often has its work performed on a contract basis by employees of other departments or agencies such as the Department of Agriculture and the Corps of Engineers. These employees, of course, may work until seventy. AID also contracts with private United States organizations to carry out much of its actual technical work. Employees of these or-

---

[5] The Government has contended that it is the difficulty of living and working abroad that makes Foreign Service work distinctive. Any such difficulty should be equally present in the Trust Territories which, like foreign countries, may be considered "hardship posts" for Government employees. See 5 U.S.C. § 5941. Thus, it seems appropriate for comparison purposes to consider employees working in Trust Territories in the same category as those working in foreign countries.

[6] If those people working in Trust Territories are excluded from the calculation, the percentage of those facing early retirement only rises to above twelve and one-half percent.

ganizations are not required to retire at age sixty and quite commonly serve above that age. Nor is it true that Foreign Service personnel are unique in having to handle assignments to unusually difficult posts or "hardship" posts. Peace Corps volunteers (and AID contract personnel) are stationed almost exclusively in underdeveloped areas of the world. Furthermore, unlike Foreign Service personnel, they often live among the poorest segments of the local populance and face any adverse conditions that may exist. These assignments are obviously as taxing and strenuous as Foreign Service assignments. Yet, there is no upper age limit at all for Peace Corps volunteers. Affidavits indicate that many Peace Corps volunteers are, in fact, over age sixty, and that there has been no noticeable problem with medical services. Finally, it is clear that Civil Service personnel also work in "hardship posts".[7] Thus plaintiffs have convincingly shown that reaching age sixty is itself no bar to Government employment overseas. The vast majority of Americans working abroad for the Government do not face early retirement, although their work may be similar in all relevant respects to that performed by Foreign Service personnel.

There remains, though, the Government contention that Foreign Service personnel are unique in that they spend significant portions of their careers abroad, and that this has a cumulative impact so that by age sixty they are generally incapable of effective service. In essence the Government says that while non-Foreign Service personnel serve abroad, they do not follow careers overseas. Plaintiffs,

[7] The record does not allow a comparison between the number of Civil Service and Foreign Service personnel serving in "hardship posts."

through discovery, attempted to compile a statistical comparison of time spent abroad by Foreign Service personnel and by other Government employees. Defendants were unable to provide this data because of the nature of their recordkeeping systems. Thus plaintiffs have submitted the first ten pages of the State Department's *Biographic Register*[8] for June, 1974 (the last date for which it is available) and an attached explanatory exhibit. Of the twenty-five Foreign Service Officers listed in these ten pages who were over age fifty, the average length of time spent overseas was fifteen years and the average length of time spent in the Service in the United States was ten years. As a comparison plaintiffs have also submitted pages from the *Biographic Register* containing the names of thirteen Civil Service employees of the Agriculture Department's Foreign Service who are over age fifty and an attached explanatory exhibit. The average length of time spent overseas by these Civil Service employees was 11.2 years and an average of eight years was spent in the Service in the United States. The Court does not find this difference in time spent overseas significant. Several other exhibits also indicate that there are many Americans in the Civil Service pursuing careers overseas in the same way that Foreign Service personnel do.

The Government has made no attempt to counter the above showing. It merely maintains that since at any given time a far higher proportion of Foreign Service personnel are serving overseas than are Civil

[8] "The *Biographic Register* provides concise biographic information on personnel of Department of State and other Foreign Government agencies in the field of foreign affairs." *Biographic Register*, July, 1971, p. 11.

Service personnel, the system is rational. It is, of course, true that a statute is not unlawful merely because it creates an imperfect classification. *Dandridge* v. *Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970). If only a small number of personnel working overseas escaped the sixty-year age limit, the Government's point would be well taken. However, we are faced with a situation where tens of thousands of Americans are working for the United States Government overseas and only a tiny percentage are singled out for early retirement. Yet this small group does not appear to serve under any more difficult conditions than the others, nor do they seem to serve for a significantly longer period of time. This system is patently arbitrary and irrational. Thus plaintiffs' motion for summary judgment is granted and the mandatory retirement provision of section 632 of the Foreign Service Act is hereby declared unconstitutional and void. Participants in the Foreign Service retirement and disability system cannot be subject to automatic retirement until age seventy. Of course, Congress is not foreclosed from redrawing the statutory scheme to eliminate the arbitrary classifications now existing and imposing any rational mandatory retirement age. This decision does not affect those provisions of the Foreign Service Act which set forth retirement benefits or alternative means of retirement, whether voluntary or involuntary.

The claims of the individual plaintiffs for back pay and reinstatement must be reviewed. Counsel are directed to confer in light of this opinion and submit an appropriate form of order within two weeks resolving the claims for back pay and reinstatement.

Each party shall bear its own costs and fees.

APPENDIX B

United States District Court
For the District of Columbia

Civil Action No. 76-0085

HOLBROOK BRADLEY, ET AL., PLAINTIFFS

v.

CYRUS R. VANCE, SECRETARY OF STATE, ET AL., DEFENDANTS

ORDER

Upon consideration of Defendants' Motion To Dismiss or in the Alternative For Summary Judgment, Plaintiffs' Opposition thereto which has been considered as a cross-motion for summary judgment, the oral argument of counsel and the entire record in this case, and it appearing to the Court for the reasons stated in the memorandum opinion filed June 28, 1977, as modified by the order filed July 28, 1977, that Section 632 of the Foreign Service Act 22 U.S.C. § 1002 as amended, which required mandatory retirement at age 60 of several of the named plaintiffs is unconstitutional in that it violates the equal protection guarantees embodied in the Fifth Amendment, and it further appearing to the Court that individual plaintiffs who have been subject to mandatory retirement pursuant to this provision are entitled to back pay and reinstatement should they so elect, it is by the Court this 14th day of October, 1977

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment be, and the same hereby is, denied, and it is

FURTHER ORDERED that plaintiffs' cross motion for summary judgment be, and the same hereby is, granted and it is

FURTHER ORDERED that Section 632 of the Foreign Service Act, 22 U.S.C. § 1002, as amended, is hereby declared unconstitutional and void, and it is

FURTHER ORDERED that defendants are to reinstate in the Foreign Service the individual plaintiffs who have been previously subject to mandatory retirement pursuant to section 632, if otherwise qualified under defendant's medical and security regulations, and to correct record of these individual plaintiffs to show that they had not ceased to serve as Foreign Service Officers and effectuate all compensation and other personnel actions which would have occurred had they not been so retired.

ROGER ROBB,
United States Circuit Judge,
GERHARD A. GESSELL,
United States District Judge,
THOMAS A. FLANNERY,
United States District Judge.

APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 76–0085

HOLBROOK BRADLEY, ET AL., PLAINTIFF
v.
CYRUS R. VANCE, ET AL., DEFENDANTS

NOTICE OF APPEAL

Cyrus R. Vance, Secretary of State; John E. Reinhardt, Director of the United States Information Agency; Alan K. Campbell, Jule M. Sugarman, and Ersa H. Poston, Commissioners of the United States Civil Service Commission; and the United States of America, defendants in the above-styled action, appeal to the Supreme Court of the United States from the final judgment of the district court entered in this action on October 14, 1977. This appeal is taken under 28 U.S.C. 1252 (1970) and 28 U.S.C. 1253 (1970).

Dated at Washington, D.C., this 10th day of November, 1977.

Respectfully submitted,

EARL J. SILBERT,
United States Attorney,
ROBERT N. FORD,
Assistant United States Attorney,
JOHN R. DUGAN,
Assistant United States Attorney.

APPENDIX D

HOLBROOK BRADLEY ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER ET AL., DEFENDANTS

Civ. A. No. 76–0085

United States District Court, District of Columbia

June 30, 1976

MEMORANDUM AND ORDER

GESELL, *District Judge.*

This action is brought by ten Foreign Service employees of the Department of State or the United States Information Agency who have been or will be subject to mandatory retirement at age 60, pursuant to Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. § 1002 (FSA). The eleventh plaintiff is an organization purporting to represent both former and present Foreign Service officers subject to this retirement provision. The named plaintiffs seek to maintain the suit as a class action.

Plaintiffs' primary claim is that as a matter of statutory construction the age 60 retirement mandated by FSA has been superseded and repealed by the Age Discrimination in Employment Act of 1967, as amended in 1974, 29 U.S.C. § 633a (ADEA).[1] The

[1] Alternatively, the complaint alleges violations of due process and equal protection, arbitrary and invidious classification, discrimination in application of existing regulations and failure of the Civil Service Commission properly to implement the Act.

complaint prays generally for declaratory and injunctive relief, as well as for reinstatement, back pay and other monetary relief pursuant to 29 U.S.C. § 633a(b) for persons already subjected to mandatory retirement. The parties have cross-moved for summary judgment on this question of statutory interpretation and plaintiffs have also moved for class certification which the federal defendants oppose. These motions were fully briefed and argued and are now before the Court for decision.

On April 13, 1976, the named plaintiffs filed a motion under Fed.R.Civ.P. 23(c)(1) for class action certification seeking to represent the following persons:

> All Foreign Service Officers and Foreign Service Information Officers, age 40 or older, who have been, or are now employed by the defendant Department of State or the defendant United States Information Agency, and who in the past six years have been subjected to, or are subject in the future to, mandatory retirement at age 60, pursuant to the rules, policies and practices of the defendant agencies or pursuant to Sec. 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1002.

Plaintiffs seek certification of their case as a "(b)(2)" class action.

[1,] This putative class consists of two categories of plaintiffs: present employees and past employees who have already been mandatorily retired under FSA since 1974. As to the latter, the Court concludes that the group cannot be included in a class action here. The relief requested for these people consists of reinstatement and back pay pursuant to 29 U.S.C. § 633a(b). However, none of the plaintiffs who purported to represent these individuals have complied with the statutory requirement that notice of intent to bring such a suit must be given to the Civil Service Commission within 180 days after the alleged unlawful practice, 29 U.S.C. § 633a(d). Since the jurisdictional prerequisite has not been satisfied by any of the named plaintiffs, there is no representative of this group properly before the Court.[2] Moreover, since reinstatement is sought, the interests of such people may well conflict with those of present employees who are also defined as part of the class. *Cf., e. g., Freeman* v. *Motor Convoy, Inc.*, 409 F.Supp. 1100, 1113 (N.D.Ga. 1976). Accordingly, past employees who have already been retired are not within a proper class.

As to the category of present employees, who seek declaratory and injunctive relief rather than the remedies created by the ADEA, certain of these individuals are sufficiently threatened with imminent mandatory retirement to entitle them to prosecute this suit. The only question, therefore, is whether they can maintain the case as a class action. Defendants, citing section 7(b) of the ADEA, 29 U.S.C. § 626(b), and section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), argue that a class action can never be brought for age discrimination in Federal Government employment. In support of this contention they rely primarily on *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975), which held that Rule 23

---

[2] The statute is open to the construction that every member of the class of past employees would have to meet this requirement, *cf. Freeman* v. *Motor Convoy, Inc.*, 409 F. Supp. 1100, 1114–16 (N.D.Ga. 1976), but under the facts of the present case the Court finds it unnecessary to consider this question.

class actions are inappropriate in age discrimination suits against private employers. *See also Schmidt* v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975). Plaintiffs correctly point out in response that there are significant differences between the governmental and private situations. In particular, the statutory section applicable to the Government, unlike that pertaining to private parties, does not provide that it is to be enforced under the Fair Labor Standards Act. Rather, it expressly provides that enforcement shall be by the Civil Service Commission, 29 U.S.C. § 633a(b), and that aggrieved persons may under appropriate circumstances file civil actions in Federal District Court, 29 U.S.C. § 633a(c, d). The Court need not resolve this issue, however, since it finds in any event that the record at this time does not support the certification of a class under Fed.R.Civ.P. 23. First, it is unclear whether plaintiffs have satisfied the basic requirement of numerosity and impracticability of joinder. Defendants dispute plaintiffs' estimate of the number of people involved, and the present record, without some discovery by plaintiffs, does not sufficiently inform the Court of the facts. This conclusion is also reinforced by the above determination that only present employees may be members of the class, which reduces even further the probative value of plaintiffs' preliminary appraisals. Moreover, as will be more fully discussed below, the mandatory age provision is part and parcel of a larger retirement system. Some employees may not object to being retired at age 60 in order to enjoy the benefits afforded by this system, and the interests of such people may well be jeopardized if plaintiffs prevail. Therefore, it cannot be said that there are common interests between the named plaintiffs and the members of the asserted class. Finally, even in the absence of a class, appropriate equitable relief can be fashioned, if warranted, which will as a practical matter protect those people plaintiffs seek to represent, and therefore it is unnecessary and inadvisable to encumber this suit with the burdens of a class action, *see, e.g., Berlin Democratic Club* v. *Rumsfeld,* 410 F.Supp. 144, 163-64 (D.D.C. 1976). The Court thus concludes that class certification is inappropriate, at least at this time.

Accordingly, a class action cannot be maintained on the question of statutory interpretation that is now presented. Of course, this is without prejudice to a renewed motion at a later time or on the other issues in this case if they are to be litigated. And since the matter of a class action is of little practical consequence to the resolution of the substantive statutory issue or the granting of prospective declaratory or injunctive relief, the Court will proceed to consider the merits of plaintiffs' claim.

Section 632 of FSA (22 U.S.C. § 1002) provides:

> Any participant in the Foreign Service Retirement and Disability System, other than one occupying a position as chief of mission or any other position to which he has been appointed by the President, by and with the advice and consent of the Senate, who is not a career ambassador or a career minister shall, upon reaching the age of sixty, be retired from the Service and receive retirement benefits in accordance with the provisions of section 1076 of this title, but whenever the Secretary shall determine it to be in the public interest, he may extend such participant's service for a period not to exceed five years.

Section 15 of ADEA (29 U.S.C. § 633a) provides:

> (a) *All personnel actions affecting employees* . . . in military departments as defined in

> section 102 of title 5, United States Code, *in executive agencies as defined in section 105 of title 5, United States Code* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress *shall be made free from any discrimination based on age.*[3] (Emphasis added.)

Based on the conflict between these provisions, plaintiffs argue that the ADEA implicitly repealed this section of the FSA. Defendants disagree, contending that the two provisions are not in irreconcilable conflict since the FSA concerns only mandatory retirement at age 60 and does not affect the conceded applicability of the ADEA to all other personnel action. They also point out that the FSA is the more specific and narrow of the two statutes, thus making it unlikely that Congress intended to repeal it by subsequently enacting the ADEA.

---

[3] 5 U.S.C. § 105 States:

"For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment."

5 U.S.C. § 101 states:

"The executive departments are: The Department of State . . ."

5 U.S.C. § 104 states:

"For the purpose of this title, "independent establishment" means—(1) an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; . . ."

The parties are in agreement that repeals by implication are disfavored. As the Supreme Court recently explained:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari,* 417 U.S. 535, 550–551 [94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 301]. "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." T. Sedgwick, Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1974).
>
> * * * * *
>
> The issue thus boils down to whether a "clear intention otherwise" can be discovered—whether, in short, it can be fairly concluded that the [later statute] operated as a *pro tanto* repeal of [the earlier one]. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 168 [96 S.Ct. 1319, 1322, 47 L.Ed.2d 653, 658]. There are, however,
>
> "two well-settled categories of repeals by implication—(1) where provisions in the

> two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . ." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 [56 S.Ct. 349, 352, 80 L.Ed. 351, 355].
>
> * * * * *

The statutory provisions at issue here cannot be said to be in "irreconcilable conflict" in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari, supra,* [417 U.S.] at 551 [94 S.Ct. at 2483, 41 L.Ed.2d at 301]. As the Court put the matter in discussing the interrelationship of the antitrust laws and the securities laws, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 [83 S.Ct. 1246, 1257, 10 L.Ed. 2d 389, 400]. *Radzanower v. Touche Ross & Co.*, —— U.S. ——, ——, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976) (footnotes omitted).

Of particular significance here to this inquiry into presumed legislative intent is the fact that Congress has recently extended the mandatory retirement pro-

vision of the FSA to cover certain Foreign Service officers or employees of the Agency for International Development, 87 Stat. 713, Pub.L.No. 93–188, 1973 U.S. Code Cong. & Admin. News 781, 792–94.[4] By this action Congress expressly indicated its belief that the Foreign Service and Retirement System provided more favorable conditions for retirement than did the Civil Service Retirement and Disability Fund and that such advantageous treatment was warranted to compensate these people for some of the personal difficulties they suffered during overseas service, H.Rep.No. 93–388, 93d Cong., 1st Sess., 1973 U.S. Code Cong. and Admin. News 2806, 2845–47. Such legislative action, affecting some 2500 individuals (*id.*) and undertaken contemporaneously with the 1974 extension of the ADEA to the Federal Government,[5] is surely expressive of legislative intent on the question of whether the mandatory retirement provision of the FSA was impliedly repealed by the 1974 amendments to the ADEA.

The Court finds it unnecessary, however, to decide this issue as formulated by plaintiffs. Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides:

> (f) It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee

---

[4] *See also* 22 U.S.C. § 1229(c). This statute was passed in 1968, after the initial enactment of the ADEA but before the 1974 amendments making the Act applicable to the Federal Government.

[5] The Foreign Assistance Act of 1973, of which the AID measure was a part, was passed by the House on December 4, 1973, and by the Senate on December 5, 1973. The 1974 amendments to the ADEA, which were included in the Fair Labor Standards Amendment of 1974, were enacted by both the House and the Senate on March 28, 1974.

> benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . .

This provision, which was part of the 1967 ADEA, is clearly incorporated in the 1974 amendment and thus applicable to the Federal Government, so that any personnel action falling within its terms cannot be deemed to be "discrimination based on age," 29 U.S.C. § 633a(a). This view is expressly supported by the legislative history of the 1974 amendments. For example, as Senator Bentsen commented when he introduced the original bill (S. 3318) to extend the ADEA to federal employees:

> Of course, Mr. President, I recognize that there are instances in which age is a legitimate factor in determining whether an individual should be hired or encouraged to retire. The Act of 1967 says very plainly that it is not unlawful for an employer to take any actions otherwise prohibited "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," or *"to observe the terms of a bona fide seniority system or any bona fide employee benefit plan—which is not a subterfuge to evade the purposes of this act."*
>
> *I am not concerned with situations that fall within these categories, but I am concerned about documented instances in which Government employees have been flatly told or indirectly pressured to retire solely because of their age* . . . 118 Cong. Rec. 7745 (1972) (emphasis added).

The House Report similarly indicates that federal employees were entitled to the same protections that private employees had received under the 1967 Act:

> The Committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal . . . government levels *as it has and continues to do in private employment.* H.Rep.No.93–913, 93d Cong., 2d Sess., 1974 U.S.Code Cong. and Admin. News 2850 (emphasis added).

Thus the cases that have interpreted 29 U.S.C. § 623 (f) as it applies in the private sector, *e.g., Brennan* v. *Taft Broadcasting Co.,* 500 F.2d 212 (5th Cir. 1974), are relevant here.

The Foreign Service Retirement and Disability System, 22 U.S.C. §§ 1061–1116, was originally enacted as part of the FSA and is administered by the Secretary of State in accordance with rules and regulations prescribed by the President. Central to the System is the annuity program described in 22 U.S.C. § 1076, which section is expressly cited and incorporated in the mandatory retirement provision, 22 U.S.C. § 1002. Under the controlling law this System, with its compulsory contributions by and annuity payments to participants in the program, is clearly a bona fide system or plan within the meaning of the statute. This also appears to have been at least the implicit view of Congress when it recently extended the System to include certain AID employees, *discussed supra.* Accordingly, under 29 U.S.C. § 623(f), the mandatory retirement provision of the FSA is not inconsistent with or in violation of the ADEA.

For the foregoing reasons, plaintiffs' motion to certify a class is denied. Defendants' motion to dismiss or for summary judgment on Count I of the complaint is granted, plaintiffs' cross-motion for summary judgment is denied, and Count I of the complaint shall be and hereby is dismissed.

A status conference to schedule further proceedings, if any, see *Massachusetts Board of Retirement* v. *Murgia,* —— U.S. ——, 96 S.Ct. 2562, 49 L.Ed.2d —— (1976), is set for 11:30 a.m. on July 13, 1976.

So ordered.

U.S. GOVERNMENT PRINTING OFFICE: 1979

A motion by the Appellees to dispense with the printing of the record in this case was made and granted.

No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.
Appellees

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO AFFIRM

ZONA F. HOSTETLER
BRUCE J. TERRIS
EDWARD H. COMER
1526 - 18th Street, N.W.
Washington, D.C. 20036
(202) 332-1882

Attorneys for Appellees

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.
Appellees

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO AFFIRM

Pursuant to Rule 16(1)(C) of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

This case involves an appeal by the government from the unanimous decision of the three-judge court below (Robb, Circuit Judge, and Gesell and Flannery, District Judges) that Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1002, which requires retirement at age sixty for those employees covered by the Foreign Service Retirement System, violates the equal protection guarantees embodied in the Fifth Amendment.

This retirement provision applies to employees of the State Department, the United States Information Agency (USIA), and the Agency for International Development (AID) who are covered by the Foreign Service Retirement System.

As originally enacted in 1946, Section 632 applied only to Foreign Service officers (a small group of employees performing primarily political and diplomatic duties) but over the years the Foreign Service system was expanded to take in other State Department employees such as visa stampers, secretaries, and technicians. USIA teaching, cultural, and information employees were added to the system in 1968 and AID employees in 1973.

The employees of the three agencies who are covered by the Foreign Service retirement system occupy a wide variety of jobs. Some are Foreign Service officers who specialize in one of four specialties: economic, administrative, consular or political. Depending on their specialty, at age sixty an officer may be performing (1) economic research and analysis; (2) personnel recruitment, management, or other administrative functions; (3) visa and other consular work; or (4) political research, analysis, and negotiations with representatives of foreign governments.

Some of these employees are USIA officers whose jobs range from performing cultural, lecturing, and other information duties, to performing administrative and personnel management functions. Cultural officers establish liason in other countries with universities and scholarly groups and with symphonies, museums, and other cultural organizations. They also maintain libraries, and arrange for exchanges of students and scholars and for tours of foreign countries by American artists. Information officers establish liason with the media in other countries, prepare press releases, prepare and distribute film strips and maintain film libraries. USIA personnel also provide

the staffing for the Voice of America broadcasts and arrange for satellite programming.

Some of these employees are personnel of the Agency for International Development which is concerned with providing economic and technical assistance to other countries.

Finally, some of these employees are staff employees (rather than officers) and include librarians, secretaries, clerks, language teachers, radio and television engineers, and a wide variety of support personnel.

The vast majority of the Foreign Service employees perform functions (teaching, cultural liason, engineering, research, etc.) similar to those performed by civil service employees.

Appellee-employees brought suit in the District Court for the District of Columbia claiming a denial of the equal protection guarantees embodied in the Fifth Amendment on the ground that the age sixty retirement provision failed to meet the rational basis standard of review enunciated by this Court.

The government-appellants defended this suit primarily on the ground that the reason set forth in the legislative history of the provision, and more fully set forth in a letter dated July 28, 1975, from the Director General of the Foreign Service to the Civil Service Commission (Gov. Ex. 2) demonstrated a rational basis for the age sixty retirement requirement, to-wit: the government needs to maintain the Foreign Service corps as a corps of highly qualified individuals with the necessary physical stamina and intellectual ability to perform effectively at posts around the world, and since Foreign Service employees who reach age sixty have been exposed to extraordinary hazards and stresses by working overseas that other employees have not, they do not have the necessary physical stamina and intellectual ability to perform their jobs.

The appellees responded that however rational the government's claim might sound on first impression, the actual facts would show that overseas work does not involve extraordinary hazards and stresses dissimilar to those faced by other government employees, and that, in any event, overseas work does not diminish the physical stamina or intellectual ability of post-sixty year old employees to perform their varied jobs.

Appellees served an initial set of interrogatories on the government agencies which was answered. Appellees then attempted to serve additional interrogatories, to take depositions, and to present testimony of witnesses for the purpose of supporting their contention that there was no rational basis for the age sixty retirement provision. The government agencies opposed the answering of further interrogatories or the taking of depositions and insisted that the case could be decided by the district court on the basis of the government's motion for summary judgment. The district court agreed with appellants and set for hearing the government's motion for summary judgment.

The district court had before it the pertinent excerpts from the legislative history cited by the government and the letter from the Director General of the Foreign Service to the Civil Service Commission of July 28, 1975. The district court also had before it (1) a number of affidavits introduced by appellees, including affidavits of medical and other experts, and (2) extensive statistical data and other factual information obtained from the government records made available to appellees. This evidence was introduced by appellee-employees to demonstrate that there was no basis in fact for the government's claim that overseas work diminishes the competence of Foreign Service employees.

Subsequent to the hearing, the district court issued an order on December 3, 1976 stating that the record relating to the rationality of the classification challenged appeared

to be incomplete, particularly with respect to the factors underlying congressional enactment of it. The parties were requested to supplement the record with additional affidavits, which was done on February 1, 1977. Subsequently, the district court requested additional supplementary information. However, plaintiffs were still not given an opportunity to engage in additional discovery.

Appellees contended throughout the proceeding below that if they were given the opportunity to proceed with additional interrogatories, the taking of depositions, and the introduction of witness testimony, they would be able to introduce further evidence that overseas work does not diminish the ability of Foreign Service personnel to perform their various jobs. For example, in their Memorandum in Support of Motion for Permitting Plaintiffs to Engage in Discovery, Feb. 1, 1977, appellees stated that they wished to obtain statistical data from the medical division of the defending agencies in order to further support their contention (already supported in affidavits) that proportionally more Foreign Service employees under the age of 50 are medically disqualified from serving at hardship posts than are employees over the age of 50, and that proportionally more employees under the age of 50 are given medical discharges for psychological and psychiatric health problems than are employees over the age of 50.

Although given a specific opportunity to supplement the record with additional factual information to support their claim that overseas work diminishes the ability of Foreign Service employees to perform their varied jobs, government appellants submitted no independent evidence. Instead, appellants relied entirely on the statements in the legislative history and the statement of their own personnel director that mandatory retirement at age sixty is required because extraordinary conditions overseas impair the ability of post-sixty year old employees to perform their jobs.

Appellees contended in their Memorandum filed February 1, 1977 (at 3-4) that given the slim factual showing by appellants to support their claim, the district court had before it sufficient evidence introduced by appellees to demonstrate that there was no rational purpose for the provision at issue. Appellees stated that if the court agreed with this view, they would waive their right to further discovery and would consent to the court treating the case as if submitted on cross-motions for summary judgment. Appellees insisted, however, that if the court did not agree that there was sufficient evidence to find for appellees, they wanted, and were entitled to, the opportunity to proceed with discovery and the opportunity to introduce additional evidence.

The district court issued its unanimous opinion in favor of appellees on June 30, 1977. The district court's opinion noted that under this Court's decisions, the proper test for adjudging the disputed provision was whether there was a rational basis to support it. The district court went on to state that the "rational basis standard" means that a legislative provision is "presumptively valid" and that its challengers have a "heavy burden in proving its invalidity" (J.S. 3A). The district court concluded: "On the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (*Id.* at 3A-4A).

ARGUMENT

1. THE QUESTION IS NOT SO SUBSTANTIAL AS TO REQUIRE PLENERY CONSIDERATION.

The three-judge court below decided this case on the basis of the factual record presented to it by the parties. No new or precedential questions of law were decided. The court below simply, and properly, applied to the facts before it the rules of law enunciated by this Court

in those previous equal protection cases which involved a rational basis standard of review. *E.g., Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971).

In *Murgia*, this Court ruled that the proper standard for judicial review of a classification based on age is whether it is rationally related to a legitimate governmental objective. 427 U.S. at 314. As the district court below noted, this standard of review does not require judicial abdication although it does mean that the legislatively drawn distinction is "presumptively valid" and that its challengers have a "heavy burden in proving its invalidity" (J.S. 3A).

In *Murgia*, this Court reviewed the factual evidence in the record and concluded on the basis of that record that a mandatory retirement age of 50 for uniformed policemen was rationally related to the legitimate government goal of protecting the public. This Court specifically found, for example, that members of the uniformed branch of the Massachusetts State Police were required to perform the most physically demanding and arduous police tasks and that the less physically demanding jobs, such as detective work, juvenile and women's work, or desk jobs, were handled by entirely separate branches of the State Police whose employees did not have to retire until age 65 but whose positions were not available to members of the uniformed branch (*id.* at 310, 315-316). This Court noted that the uniformed branch officers participated in controlling prison and civil disorders, responded to emergencies and natural disasters, patrolled highways in marked cruisers, investigated crimes, apprehended criminal suspects and provided back-up support for local law enforcement personnel (*Id.* at 309). This Court further noted that it had never been seriously disputed, if at all, that the work of the state uniformed officers was more demanding than that of

other state, or even municipal, law enforcement personnel, and that it was this difference in work that underlay the earlier retirement age for uniformed policemen (*Id.* at 315, note 8). This Court also pointed to the medical evidence in the record that established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group (*Id.* at 311). Since the factual record before this Court showed that the tasks of the uniformed police branch—controlling riots, apprehending criminal suspects, etc.—were inherently "stress" functions, this Court concluded that "Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police" (*Id.* at 314). In short, this Court's holding in *Murgia* is clearly not that all age limitations are reasonable and constitutional but rather only that this issue must be determined on the basis of the record in the particular case.

The present case presents a wholly dissimilar factual situation to that in *Murgia*. Here we are concerned with a wide variety of jobs, nearly all of which are white collar desk jobs and none of which involves physical protection of the public.

Although they were precluded from completing discovery, appellees nonetheless introduced substantial evidence—largely in the form of affidavits and statistics drawn from government records—to support their challenge to the age sixty retirement provision. The three-judge court unanimously found on the basis of this evidence that appellees had sustained their "heavy burden" in proving the invalidity of the provision. Appellants present no compelling reasons why this Court should embark upon a review of the lower court's analysis of that factual record.

Appellants merely repeat here their factually unsupported claims made to the court below—that Foreign Service personnel, unlike other government personnel, tend to work overseas, that this work entails unusual physical and psychological difficulties, and because of these circumstances, their ability to carry out assignments after the age of sixty, particularly at so-called "hardship posts" overseas, is diminished.

The government compiled no medical findings, no statistics, and no objective empirical studies to support their claims similar to those accumulated by the Department of Transportation in establishing a mandatory retirement age of 56 for air traffic controllers, by the Federal Aviation Agency in establishing a mandatory retirement age of 60 for airline pilots, or by the State of Massachusetts in establishing the mandatory retirement law for uniformed policemen which was challenged in *Murgia*.[1] Similarly, no such empirical studies were made either before enactment of Section 632 in 1946 (or before enactment of its earlier analogous provision relating to

---

[1] Congress has relied upon detailed scientific and empirical studies in establishing lower retirement ages for workers in jobs involving public safety. Thus, before establishing a mandatory retirement age of 56 for air traffic controllers, it relied upon studies by the Department of Transportation wihch examined all available data concerning the relationships between stress, age and occupation, and tested the physiological impact of stress on air traffic controllers. H.R. Rep. No. 615, 92nd Cong., 1st Sess. 5-15 (1971).

Similarly, as the Second Circuit noted in *Airline Pilots Assn. v. Quesada*, 276 F.2d 892, 898 (1960), the Federal Aviation Agency undertook an empirical study before it enacted a regulation requiring airline pilots to retire at age 60. The agency based its decision on medical evidence in the record that sudden incapacitation due to heart attacks or strokes becomes more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks. Because of this, the Second Circuit held that the age sixty limit had a rational relationship to the FAA's job of providing for air safety and particularly for protecting the public from air accidents.

consular officers in 1924) or in subsequent years as additional categories of employees were brought under the Act. Moreover, the government-appellants did not submit any objective empirical evidence to the court below to counter the evidence submitted by appellees. The government's argument seems to be that so long as it can assert a basis for the mandatory retirement provision which sounds rational, whether or not the assertion is based on actual facts, that is the end of the judicial inquiry. As the court below properly noted, however, the rational basis standard of review, even though it imposes a heavy burden on a party challenging a legislative classification, does not require total judicial abdication. The facts simply do not support appellants' claims.

For example, the appellants claim that Foreign Service employees spend 30 years or more of service representing the government in foreign countries in widely differing climates and environments (J.S. 9). However, an analysis of the careers of Foreign Service employees listed in the State Department's *Biographic Register* for 1974 showed that Foreign Service employees over the age of fifty had served an average of 15 years abroad (Pl. Ex. 12). All Foreign Service employees are required to serve some tours in the United States and, as is evident from the *Biographic Register*, many spend the majority of their careers in the States. Indeed, the undisputed evidence shows that some Foreign Service employees are even ineligible for overseas duty and are assigned to work permanently in the States (Def. Ans. to Pl. Amended Interrog., Paras. 21-22).

The appellants also state (J.S. 16) that the Foreign Service employs a special corps of persons, who enter the Service during their youth. However, many employees enter the Service at later stages of their careers. Plaintiff Olsen, for example, had been a language teacher for many years when he joined the USIA at age 45.

Mr. Van den Berg had been manager of field services for a large international corporation when, at the age of 47, he was recruited by USIA to supervise its power plants at overseas Voice of America stations. (Olsen Aff., para 1; Van den Berg Aff., Para. 1).

And while appellants claim (J.S. 9, 12) that the Foreign Service work which is overseas consists of "discomforts" and service in "isolated, primative or dangerous areas", the undisputed evidence in the record shows that most of the overseas work is not in such areas (commonly referred to as "hardship posts").[2] Only 22% of all State Department Officer positions, only 11% of all USIA officer positions, and only 11% of all staff positions in the Foreign Service are at hardship posts (Webb Aff., para. 2).[3] Most overseas positions in the Foreign Service are in such non-hardship posts as London, Paris, and Nassau.

Even at the so-called "hardship posts," the evidence in the record shows that the hardship conditions cited in the government's letter to the Civil Service Commission (Gov. Ex. 2)—poor housing, limited variety, poor quality, and unsafe foods, substandard sanitary conditions, etc.—largely existed in the past and, in any event, are largely inapplicable to Foreign Service employees. Thus, while adequate housing and sanitary facilities may be in short supply, and large segments of the local population may live in substandard housing with substandard sanitary facilities, the uncontradicted evidence in the record is

---

[2] Those posts which the government considers to be isolated, lacking in cultural amenities or adequate elementary and secondary schools, or otherwise undesirable, are classified as hardship posts, and employees of both the Foreign Service and the Civil Service are entitled to extra pay while serving at such posts (Pl. Exs. 3 and 4).

[3] By way of contrast, 80 of 286 Agriculture Department employees overseas in 1975 (or 28%) were located at hardship posts (J.S. 14, note 9).

that housing and sanitary facilities for Foreign Service employees is never substandard and is frequently superior to that enjoyed by Civil Service employees in the United States (Barall Aff., para. 9; Olsen Aff., para. 6; Van den Berg Aff., para. 5; Wells Aff., paras. 4-5). For example, appellee, Mary Cardoso, a secretary, and her husband were provided with a two-bedroom air-conditioned apartment in Zanzibar, complete with two full-time servants and use of the embassy swimming pool and tennis courts (Cardoso Aff., para. 3). Appellee Olsen's affidavit states that "[t]he housing has been better than what I could have obtained in the United States for the same price" (Olsen Aff., para. 6).

And while there may be a limited variety and quality of food available in local markets, the record shows that Foreign Service personnel usually have the use of United States government commissaries as well as the use of airplanes which fly in fresh food from nearby posts (Barall Aff., para. 10).

Moreover, many of the "hardship posts" have other amenities not available to the majority of Washington civil servants—for example, low-cost household help, unpolluted beaches and air, private swimming pools and tennis courts paid for by the U.S. government, inexpensive liquor and food, slower pace of life, and high status in the local community (Barall Aff., paras. 9-10).

Although the government claims (J.S. 9-10) that "the threat of terrorist activity has grown in many areas," the undisputed expert witness testimony in the record is that terrorist attacks occur rarely, and when they do occur, they are not aimed at older aged employees more than the younger ones (Barall Aff., para. 11).[4]

[4] Indeed, appellees' expert witness, Ambassador Barall, surmised that statistically there is a greater possibility of criminal attack on the streets of Washington for the thousands of civil service employees who work here (and who can continue to work after the age of sixty) than there is possibility of terrorist or wartime attack on Foreign Service personnel overseas. Moreover, Ambassador Barall noted that Foreign Service employees are provided with guarded homes and personal armed guards, if necessary, a protection not ordinarily afforded civil servants in Washington.

The undisputed evidence in the record shows that Foreign Service employees are not policemen, are not even armed, and are not expected to resist or counter terrorist attack or other violence (Barall Aff., para. 11; Wells Aff., para. 6).

Although the appellants claim (J.S. 9) that Foreign Service employees working overseas are subject to "unhealthful conditions and extremes of climate," the undisputed medical evidence in the record shows that none of the health conditions cited by appellees in this letter to the Civil Service Commission (undulant fever, dysentry, hepatitis, typhoid and tuberculosis) are age related. Moreover, the medical evidence shows that long-term medical condition is not ordinarily affected by bouts of the infectious diseases still prevalent in some underdeveloped countries. (Kessler Aff., paras. 2-3; Munzer Aff., paras. 2-3). The undisputed medical evidence submitted by appellees from a pulmonary specialist showed that there is no medical relationship between aging and the ability to live and work in countries that have extremes of climate or atmosphere and that, in addition, respiratory ailments are more likely to develop or be aggravated in individuals living and working in Washington's highly polluted summer climate than they are to develop or be aggravated in most underdeveloped countries or countries having high altitudes (Munzer Aff., paras. 2, 4). Finally, appellants' medical witnesses pointed out that the general health of Americans has improved steadily in recent decades, their life expectancy has increased, and world health standards have also improved (Munzer Aff., para. 3).

Contrary to the appellants' claim (J.S. 9) that overseas posts are often lacking in medical facilities, the undisputed evidence in the record is that virtually no posts in today's world are lacking in necessary medical faciii-ties and that since the original establishment of the Foreign Service, medical facilities have been established at nearly every post sufficient to take care of usual health problems. In addition, when specialized care is needed, the government provides transportation by air ambulance to major medical centers at no costs to Foreign Service employees at virtually every post (a service not ordinarily provided Civil Service employees working in the United States) (Barall Aff., para 3; Wells Aff., para 4; Cardoso Aff., para. 2). The undisputed affidavit of Dr. Kessler, a physician formerly on the medical staff of the Foreign Service, states that while occasionally Foreign Service employees need to be evacuated to a major medical center for specialized care, this event occurs to employees, and their dependents, at all ages (Kessler Aff., para. 3).

Although the appellants apparently claim (J.S. 9, 14) that overseas work, particularly at hardship posts, entails such unusual physical and psychological difficulties that older employees are less able than younger ones to be assigned to overseas posts, the undisputed statistical evidence in the record, based on information provided by the appellants, shows that older Foreign Service employees between the ages of 55 and 60 serve at hardship posts in the same, or nearly the same, proportion as do all Foreign Service employees (Webb Aff., paras 2-3). In addition, appellees presented uncontradicted evidence that employees are more likely to be disqualified from going to underdeveloped areas when they are young and have young children than when they are older (Barall Aff., paras 2-4). Indeed, one of the principal reasons for classifying a post as a "hardship" post is the absence of

adequate elementary and secondary schools for dependents (Def. Ans. to Pl. Amended First Interrog. Nos. 31-32, Att. 10).

While the appellants claim that Foreign Service employees must be mobile and accept assignments to different posts (J.S. 14) and thus experience "difficult and unsettling changes in their modes of life" (J.S. 8), the appellees submitted the uncontradicted testimony of experts that older workers working overseas have no more difficulty adjusting to changed conditions than younger ones (English Aff., para. 3; Fox Aff., para. 3) and that the psychological stresses of isolation or of establishing a new household in a new setting are ordinarily far greater for Foreign Service employees when they are young or have young children than when they are older and their children are grown (Barall Aff., para. 2).

Appellants further claim that Foreign Service employees are unique because they devote a substantial part of their careers to overseas duty (J.S. 14). Appellees submit that the question of whether or not Foreign Service employees work overseas for greater periods of time than other government employees is irrelevant since the appellants have failed to submit any evidence to show a correlation between working overseas and diminished physical and mental capacity to work. Nevertheless, in response to the district court's request, appellees submitted evidence that larger numbers of Civil Service employees work overseas (58,489) that Foreign Service employees (4,787) and that an individual Civil Service employee working overseas is as likely to spend a siganificant portion of his career overseas as is a Foreign Service employee. For example, appellees showed that employees of the Foreign Agricultural Service (who do not have to retire until age 70) serve overseas in approximately the same manner and for nearly the same number of years as Foreign Service employees (Pl. Ex. 12). Ap-

pellees also introduced Defense Department publications which showed that civilian employees of the Defense Department's Overseas Dependent Schools program—including librarians, teachers, guidance counsellors, social workers and psychologists—who can work until age 70, and who are required to accept assignments to any overseas posts in the world, are employed through the world and that many have in fact worked continuously abroad for 15 to 28 years. (Pl. Resp. to Def. Resp. to Request for Information, June 1, 1977, and Pl. exhibits referred to therein).[5]

In sum, the district court properly concluded, in light of the largely undisputed factual record before it, that there was no basis in fact for appellants' claim that overseas work diminishes the ability of Foreign Service personnel to perform their varied white collar jobs. It properly did not conclude, as this Court did in *Murgia*, that heart attack or any other sudden incapacitating illness on the part of such personnel would present a threat to public safety. There is no compelling reason why this Court should now review the district court's considered review of the evidence presented.

The only basis for the age 60 retirement provision which is sustainable on the record is that stated in a 1966 study of federal retirement systems submitted to Congress, (S. Doc. No. 14, 90th Cong., 1st Sess. 112 (1967):

[5] Appellants are mistaken when they state that a Defense Department regulation limits the overseas tenure of Defense Department employees to a term of five years (J.S. 15). The regulation cited does not apply to all Defense Department employees. The 7,500 employees of the Defense Department's Overseas Dependent Schools program, for example, are not subject to the regulation. In addition, even those civilian employees who are limited to five year tours are allowed to return overseas for subsequent five year tours after serving intervening tours in the United States.

> Retirement at age 60 also enhances the advancement oportunities of the most effective younger personnel * * *

However, while this contention was argued by the government below, and this sentence is included in a longer quotation in the Jurisdictional Statement (p. 12), the government makes no contention based on it in this Court. The reason doubtlessly is that this claim would equally justify any retirement age for any kind of employee regardless of any capability of human beings at that age to perform that kind of work. Such a claim is inconsistent with this Court's entire analysis in *Murgia* which compared the capabilities of uniformed policemen over age 50 to the kind of work expected of them. As the district court noted: "[a]n interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme" (J.S. 4A).[6]

2. THE PRACTICAL CONSEQUENCES OF THE DECISION BELOW ARE INSUBSTANTIAL.

The decision below affects only those employees of the State Department, the USIA, and AID who are covered by the Foreign Service retirement system. Many other employees of the three agencies are not affected because they belong to separate personnel systems and thus are not requird to retire at age sixty. The decision below does not

[6] The appellants introduced no empirical evidence that older white collar employees generally, or post-sixty year old Foreign Service employees in particular, are less able to perform their jobs than younger employees. On the other hand, appellees and *amici* cited numerous scientific studies conducted by the government and others concerning the relationship between aging and ability which concluded that the performance of middle-aged and older persons is at least equal to and oftentimes noticeably better than younger workers, particularly in white collar positions. *E.g.*, *Developments in Aging: A report of the Special Committee on Aging*, 93rd Cong., 1st Sess. 72 (1973).

affect any other federal government employees, the great majority of whom are in the Civil Service and have been allowed to work until age seventy. (Congress recently amended the Age Discrimination in Employment Act to eliminate mandatory retirement entirely for most Civil Service employees. Pub. L. 95-256, 95th Cong., 2nd Sess.).[7]

The decision below will affect only a small number of Foreign Service employees. The three agencies combined employ some 8,000 employees who are covered by the Foreign Service retirement system. However, data furnished by appellants below shows that most individuals entering the Foreign Service do not remain in the Service until aged sixty. The Service provides voluntary retirement for its employees at the age of fifty and many employees take advantage of this provision. Others voluntarily withdraw from the Service before the age of fifty. In addition to voluntary retirement, some employees are involuntarily retired each year because they fail to pass the biennial medical review. Some Foreign Service officers are selected out each year because the annual performance review shows that they are in the bottom ranks of their classes. Still other officers are selected out each year

[7] Congress refrained from extending the new legislation eliminating mandatory retirement to those few categories of employees subject to mandatory retirement provisions in other specific statutes (such as that governing the Foreign Service). Congressman Hawkins, floor manager for the legislation, explained that the leadership of the House Committee on Education and Labor sponsoring the legislation had agreed with the chairmen of the International Relations and Post Office and Civil Service Committees not to extend the new legislation "in order to provide the respective committees charged with jurisdiction over these mandatory retirement provisions the opportunity to review these statutes. . . ." 123 Cong. Rec. 9344, Sept. 13, 1977. Congressman Hawkins noted further that "by this action, we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement [to defer] is to afford the committees the opportunity to review these statutes" (*Id.* at 9969).

because they have not been promoted within specified time limits. As a result of voluntary retirements and selections out, the record shows that as of February 28, 1976, only 51 officers and staff employees who were born 59 years earlier were on the Foreign Service rolls of the State Department (Pl. Ex. 5). The holding of the district court, however, will not mean that even all of these fifty-one employees will actually remain employed beyond age 59. As a practical matter, only a lesser number can be expected to want to work beyond the age of sixty. Moreover, it is reasonable to assume that those few employees who have not been selected out by appellants as a result of the annual performance and biennial medical reviews, and who have not voluntarily retired by age sixty, are individuals whose health is good, whose work performance is good, and are individuals who, notwithstanding the fact that they might (or might not) have been employed in the Foreign Service for their entire working careers, have not lost their enthusiasm for their jobs.

Contrary to appellants' arguements (J.S. 17), the decision below does not prohibit the government from legislatively creating different employment rules for different jobs. The military armed forces, the postal service, the Peace Corps, the Health Service, and other employee groups can continue to be subject to their own separate employment rules and conditions. The Foreign Service can continue, as the district court specifically recognized (J.S. 8A) to have its own distinctive recruitment, promotion, pay and selection out features. Nothing in the decision below requires that all government employees be treated alike. The court below merely held that one aspect of the Foreign Service system was discriminatory. So long as the other features of that system bear a rational relationship to a valid governmental purpose, they would not be subject to challenge on the basis of the decision below. Thus, Congress can offer higher pay and the option of

earlier retirement to Foreign Service personnel as a recruitment device to offset the inconveninece of moving many times and living away from the United States for periods of time since such benefits serve the rational governmental purpose of recruiting well-qualified personnel into the Foreign Service.[8]

The decision below does not prohibit the government from setting a term of years in which an employee can serve in any particular job. For example, by statute individuals can be employed in the Peace Corps for not more than five years, 22 U.S.C. 2506(a)(2). (However, such employees can serve five years even if they are aged 65 or 70 and thus the classification does not discriminate on the basis of age.) Congress similarly can limit service in the Foreign Service to a term of years if it so chooses. So long as such term of service is not irrationally predicated upon age, when age has no bearing on ability to perform the jobs in question, such a provision would presumably be valid.

---

[8] Whether or not the total Foreign Service employment and retirement system is more or less beneficial than that offered Civil Service employees is a complex issue and one that has been debated on numerous occasions by employee unions, agency personnel managers, the Civil Service Commission and others. Appellants claim (J.S. 17-18) that the Foreign Service system is more beneficial than that of the Civil Service. However, as appellees noted below in their Memorandum in Opposiiton to Defendants' Motion to Dismiss dated Nov. 24, 1976, at 33-34, many aspects of the Civil Service retirement program are more beneficial than comparable aspects of the Foreign Service program. In addition, the amount of annuity received by a Foreign Service employee upon mandatory retirement at age 60 is ordinarily not significantly greater than that received by a Civil Service employee retiring at age 60 and is less than that earned by the Civil Service employee who works past the age of 60. Moreover, the Foreign Service employee who cannot continue his career past the age of 60 is required to live during the ten year period between 60 and 70 on a substantially lower income than that earned by a comparable employee in the Civil Service who continues ot work to age 70.

The decision below also does not prohibit the government from providing for earlier retirement in the cases of policemen, firemen, air traffic controllers, Armed Forces personnel, or other persons in demonstrably hazardous jobs such as the uniformed patrollman's job in *Murgia* where declining physical ability due to advancing age can fairly be said to pose a risk to the public safety. Indeed, it is still open to the Government to demonstrate that some particular jobs in the Foreign Service are in this category.

Nor does the decision below in any way limit the government's ability to hire, to promote, and to discharge on the basis of ability to perform. President Carter has recently proposed a reorganization of the Civil Service, H.R. 11280, 95th Cong., 2nd Sess. One feature of the new proposal is the establishment of a category of high-ranking civil servants who will be rewarded and promoted according to performance and who will be demoted to lower rankings if their performance is inadequate. Similarly, there is nothing to prevent the Foreign Service from instituting such demotions. And, of course, the decision in no way limits the Foreign Service's already existing authority to select out officers on the basis of performance. Similarly, the decision in no way limits the existing authority of the Foreign Service to discharge its personnel for medical reasons.

The decision below stands only for the principle that a legislative provision setting forth a condition of employment must bear some rational relationship to a legitimate government goal. Presumably, most legislation setting forth employment conditions meets this test. In the instant case, the government's expressed purpose is to maintain a corps of employees physically and intellectually capable of performing the varied jobs of the Foreign Service. Appellees agree that this is a legitimate government objective. However, the government has completely

failed to demonstrate that post-sixty year old employees in the Foreign Service are less physically and intellectually capable of performing those jobs than younger workers. Indeed, the evidence in the record is overwhelmingly to the contrary. Thus, the district court correctly found that appellees had sustained their heavy burden of showing that mandatory retirement of sixty year old employees in the Foreign Service bears no rational relationship to the government's stated objective.

CONCLUSION

For the foregoing reasons, appellees respectfully submit that the judgment of the district court should be affirmed.

Respectfully submitted,

ZONA F. HOSTETLER
BRUCE J. TERRIS
EDWARD H. COMER
1526 - 18th Street, N.W.
Washington, D.C. 20036
(202) 332-1882

Attorneys for Appellees

April 12, 1978

No. 77-1254

In the Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
APPELLANTS

v.

HOLBROOK BRADLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

PETER BUSCEMI,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

HERBERT J. HANSELL,
Legal Adviser,
Department of State,
Washington, D.C. 20520.

MICHAEL A. GLASS,
General Counsel,
International Communication Agency,
Washington, D.C. 20547.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
APPELLANTS

v.

HOLBROOK BRADLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. 1A-8A) is reported at 436 F. Supp. 134. A prior opinion of the district court (J.S. App. 13A-24A) is reported at 418 F. Supp. 64.

JURISDICTION

The judgment of the district court (J.S. App. 9A-10A) was entered on October 14, 1977. A notice of appeal to this Court (J.S. App. 11A) was filed on

November 10, 1977. On December 28, 1977, the Chief Justice extended the time for docketing the appeal to and including February 8, 1978, and on January 31, 1978, Mr. Justice Brennan further extended the time to and including March 10, 1978. The appeal was docketed on that date, and this Court noted probable jurisdiction on May 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32.

QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, which requires persons covered by the Foreign Service Retirement System to retire at age 60, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 632 of the Foreign Service Act of 1946, 60 Stat. 1015, as amended, Pub. L. 94-350, 90 Stat. 846, 22 U.S.C. (1976 ed.) 1002 provides: [1]

[1] After this litigation began, but before the district court issued its final decision, Section 632 was amended by the Foreign Service Retirement Amendments of 1976, Pub. L. 94-350, 90 Stat. 846. The present version of Section 632, set forth here, does not differ in any material respect from the previous version.

> Any participant in the Foreign Service Retirement and Disability System, other than one occupying a position as chief of mission or any other position to which appointed by the President, by and with the advice and consent of the Senate, who is not a career ambassador shall be retired from the Service at the end of the month in which the participant reaches age sixty and receive retirement benefits in accordance with the provisions of section 821, but whenever the Secretary shall determine it to be in the public interest, such a participant may be retained on active service for a period not to exceed five years. Any such participant who completes a period of authorized service after reaching age sixty shall be retired at the end of the month in which such service is completed.

STATEMENT

Appellees are six former and four current Foreign Service employees in either the Department of State or the International Communication Agency (ICA),[2]

[2] Before April 1, 1978, the International Communication Agency was known as the United States Information Agency. It was renamed by Reorganization Plan No. 2 of 1977, 42 Fed. Reg. 62461. See also Executive Order No. 12048, 43 Fed. Reg. 13361.

Three appellees are former Foreign Service Information Officers and three are former Foreign Service staff employees of the United States Information Agency. Two appellees are currently employed as Foreign Service Reserve Officers with unlimited tenure in ICA. The remaining two appellees are Foreign Service staff employees in the Department of State.

and an organization representing such employees.[3] They filed this suit to challenge the validity of Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. (1970 ed.) 1002. Appellees contended that the requirement that Foreign Service employees retire at age 60 violated their rights under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. (and Supp. V) 621 *et seq.* ("ADEA"), the Due Process Clause of the Fifth Amendment, Executive Order No. 11141, 29 Fed. Reg. 2477, and applicable Civil Service Commission regulations. Appellees sought declaratory and injunctive relief against continued enforcement of the mandatory retirement provision. They also sought back pay and reinstatement.

The district court dismissed the primary non-constitutional claims, including the ADEA claim, on June 30, 1976 (J.S. App. 13A-24A). Appellees then abandoned their remaining non-constitutional claims. A three-judge district court was convened to consider the constitutional arguments.[4]

---

[3] Although this organization, the Charles William Thomas Memorial Legal Defense Fund, purports to represent a large number of present and former Foreign Service employees, we are informed that the American Foreign Service Association, which is both the professional association of the Foreign Service and the elected representative of the Foreign Service employees of the Department of State, intends to file a brief as *amicus curiae* in support of appellants in this case.

[4] Because this suit was filed before August 12, 1976, it is not affected by Pub. L. 94-381, 90 Stat. 1119, which repeals most provisions requiring three-judge district courts.

In response to appellants' motion for summary judgment, appellees argued that decision of the constitutional question required the presentation of evidence to show that there is no rational basis for distinguishing between Foreign Service employees, who must retire at age 60, and Civil Service employees, who may continue to work until age 70.[5] Appellants contended that the constitutional issue was a question of law that could be decided without an evidentiary hearing. Although appellees never formally moved for summary judgment, the district court treated the case as if it had been submitted on cross motions for summary judgment.[6]

On the basis of affidavits from both sides and submissions in response to the court's request for supplementation of the record, the court declared the mandatory retirement provision of the Foreign Service Act unconstitutional (J.S. App. 1A-8A). The court acknowledged that "the distinction between Civil

---

[5] On April 6, 1978, Congress enacted the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189. These amendments repealed the statute requiring most Civil Service employees to retire at age 70 (5 U.S.C. 8335(a)). The repeal will become effective on September 30, 1978 (92 Stat. 192). It does not affect the statute at issue in this case.

[6] During the hearing before the three-judge court, Judge Gesell and Judge Robb questioned counsel at some length about appellees' willingness to submit the case on the record as it then stood. The colloquy (Tr. 40-46) is less than pellucid, but it is plain that counsel for appellees did not formally request summary judgment.

Service and Foreign Service employees is proper if there is a rational basis to support it" (*id.* at 3A). It concluded, however, that "[o]n the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (*id.* at 3A-4A).

The court did not discuss the legislative history of the mandatory retirement provision. It considered instead the limited record evidence, measuring the proffered justifications for the challenged classification against the court's own assessment of the employment conditions of Foreign Service and Civil Service employees.

The court found that "less than ten percent of the American civilians who work overseas for the Government are forced to retire at age sixty" (J.S. App. 5A). It also determined that many of the overseas personnel not subject to early retirement have jobs similar to those of Foreign Service personnel and may be stationed in hardship posts. Finally, the court found that many Civil Service personnel spend significant portions of their careers abroad. The court concluded that a system under which some federal employees working abroad are "singled out" for early retirements is "patently arbitrary and irrational" (*id.* at 8A). The court therefore directed appellants to cease enforcing retirement at age 60 and to reinstate the individual appellees who had been involuntarily retired (J.S. App. 10A).[7]

[7] The court stayed the reinstatement portion of its order pending appeal (order of December 8, 1977).

SUMMARY OF ARGUMENT

This Court has held that a statutorily created mandatory retirement age for public employees must be sustained if supported by a rational basis. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307. The district court held that Congress acted unconstitutionally in establishing one mandatory retirement age for Foreign Service employees and another for Civil Service employees, including Civil Service employees who spend the majority of their careers abroad. But there was and is a rational basis for the distinction, and the Foreign Service mandatory retirement age therefore is constitutional.

1. Employment in the Foreign Service is characterized by frequent and extensive changes in environment, often accompanied by exposure to unfamiliar and unfavorable living conditions. Congress recognized the special stresses of a diplomatic career in 1924, when it created the Foreign Service and established a mandatory retirement age below that applicable to other federal employees. In the ensuing 54 years, the legislature has repeatedly reaffirmed the judgment that the unique burdens and pressures on Foreign Service personnel make compulsory retirement at a relatively early age desirable. This judgment is amply supported by the actual experience of Foreign Service employees, who typically spend more than half their careers overseas and a significant portion of that time at hardship posts. Congress could therefore rationally conclude that Foreign Service

employees should be covered by a separate retirement system with an especially early mandatory retirement age.

2. The mandatory retirement age in the Foreign Service Retirement System is an integral part of the personnel management program for Foreign Service Officers established by the Foreign Service Act of 1946. The Act reduced the mandatory retirement age to 60 in conjunction with the adoption of the "rank-in-person" structure for the Foreign Service. Foreign Service Officers are classified, not by the particular position in which they serve, but on the basis of their personal qualifications and the level of responsibility for which their previous training and experience have prepared them.

Together with the "rank-in-person" structure, the 1946 Act instituted the process of "selection-out," by which Officers who fail to achieve promotion within a specified number of years or whose performance falls substantially below that of their peers may be removed from the Service. "Selection-out" is designed to force attrition at a rate greater than would be produced by normal retirement and thus to provide increased promotion opportunities at all Officer levels in the Foreign Service.

The mandatory retirement age helps to achieve this goal by requiring Officers who have reached the summit of their careers to retire after serving for several years in posts of high responsibility. Mandatory retirement thereby ensures a steady number of openings at the upper levels of the Foreign Service and allows the "selection-out" program to operate as it should. By guaranteeing the availability of a sequence of promotions for exceptional Officers, "selection-out" and mandatory retirement create incentives for superior performance and provide attractive career prospects for qualified young persons. Congress was therefore entitled to conclude that a mandatory retirement age of 60 is rationally related to the legitimate purpose of maintaining a competent and professional diplomatic corps.

3. Appellees' attack on the Foreign Service mandatory retirement age ignores the fact that the compensation package received by Foreign Service personnel differs in numerous respects from that received by Civil Service employees. Foreign Service employment entails a distinct combination of benefits and obligations. Appellees should not be permitted to dispense with the one aspect of the Foreign Service system that they find unfavorable while retaining all the advantages that the system offers. If the district court's decision is not reversed, a series of lawsuits by dissatisfied federal employees could eventually result in the elimination of any distinction between the Foreign Service and the Civil Service. This outcome would be appropriate only if Congress had no rational basis for creating that distinction in the first place. As indicated above, however, special provisions for the Foreign Service are justified both by the unique nature of Foreign Service work and by the needs of the Service's personnel program.

ARGUMENT

THERE IS A RATIONAL BASIS FOR REQUIRING PERSONS COVERED BY THE FOREIGN SERVICE RETIREMENT SYSTEM TO RETIRE AT AGE 60, AND SECTION 632 THEREFORE DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307, 312, held that "rationality is the proper standard by which to test whether compulsory retirement at [a particular] age * * * violates equal protection." Applying the rational basis standard, the Court in *Murgia* sustained a state law requiring uniformed state police officers to retire at age 50. Legislative history canvassed by the Court indicated that the State's purpose in enacting the mandatory retirement provision was "to protect the public by assuring physical preparedness of its uniformed police" (*id.* at 314 and n. 7). The Court reasoned that "[s]ince physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective" (*id.* at 315).

The Court acknowledged that some persons older than 50 might be able adequately to perform the tasks of a uniformed state police officer, but it concluded that the challenged statute's exclusion of such persons did not prevent the retirement age from being rationally related to the State's legitimate pur-

pose. The Court concluded (*id.* at 316; footnote omitted):

> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U.S., at 485.

See also *McIlvaine* v. *Pennsylvania State Police*, 454 Pa. 129, 309 A. 2d 801, appeal dismissed for want of a substantial federal question, 415 U.S. 986; *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D. D.C.), summarily affirmed, 420 U.S. 940 (upholding mandatory retirement of Civil Service employees at age 70).

In attacking the Foreign Service mandatory retirement age, appellees in this case advance an argument slightly different from that rejected by the Court in *Murgia*. Appellees do not contend that the Constitution bars Congress from establishing a mandatory retirement age for Foreign Service employees.[8] Nor

[8] The three-judge district court thought initially that appellees wished to challenge the constitutionality of mandatory retirement generally, even if only imposed at age 70. The court rejected that perceived challenge in a footnote to its original opinion (J.S. App. 3A n. 4), but, on being informed

do they maintain that Congress could not rationally choose to set that age at 60. Rather they argue that the equal protection component of the Due Process Clause precludes the legislature from establishing one mandatory retirement age for Foreign Service personnel and another for Civil Service personnel.[9] Appellees are wrong. The congressional decision to create different retirement systems with different mandatory retirement ages for the Foreign Service and the Civil Service is supported by an articulated rational basis and should be sustained.[10]

A. Congress has required Foreign Service employees to retire at an earlier age than Civil Service employees because of the uniquely demanding nature of Foreign Service work.

1. Since the creation of the Foreign Service in 1924,[11] persons covered by the Foreign Service Retire-

---

by appellees that no such argument had been intended, the court struck all but the first sentence of the footnote in question (order of July 28, 1977).

[9] In light of Congress' recent repeal of the mandatory retirement age provision previously applicable to Civil Service employees (see note 5, *supra*), appellees' argument is tantamount to a contention that Congress may not now enforce compulsory retirement of Foreign Service employees at any age.

[10] A rational basis need not be "articulated" by the legislature. See *McGowan* v. *Maryland*, 366 U.S. 420, 425-426. But where, as here, the legislature has set out several reasons for its decision, and has adhered to its course after repeated reexaminations during more than 50 years, the case for the statute's constitutionality is all but overwhelming.

[11] Act of May 24, 1924, 43 Stat. 140.

ment System have been required to retire at an earlier age than Civil Service personnel. Congress enacted the first general retirement system for federal employees in 1920. The statute established a mandatory retirement age of 70 for most Civil Service employees who had rendered at least 15 years of service,[12] but this age limit did not apply to employees in the Diplomatic and Consular Services. When Congress subsequently decided to reorganize the Diplomatic and Consular Services into a single Foreign Service, the creation of a retirement system for Foreign Service Officers was one of the most important goals of the reorganization effort.[13] The 1924 Act establishing this system fixed the age of retirement for Foreign Service Officers at 65.[14]

In the following colloquy on the floor of the House of Representatives (65 Cong. Rec. 7564-7565 (1924)), the principal sponsor of the 1924 legislation (Rep. Rogers) explained that Foreign Service Officers would

---

[12] Act of May 22, 1920, 41 Stat. 614. The mandatory retirement of Civil Service employees at age 70 was sustained against a constitutional challenge in *Weisbrod* v. *Lynn*, *supra*.

[13] See H.R. Rep. No. 157, 68th Cong., 1st Sess. 7, 10, 16, 18 (1924); Hearings on H.R. 17 and H.R. 6357 (Foreign Service of the United States) before the House Committee on Foreign Affairs, 68th Cong., 1st Sess. 15, 127, 165-166 (1924).

[14] "When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service he shall be retired: *Provided*, That the President may in his discretion retain any such officer on active duty for such period not exceeding five years as he may deem for the interest of the United States." 43 Stat. 144.

be required to retire five years earlier than Civil Service employees because Foreign Service Officers, like military personnel but unlike most Civil Service employees, commonly were rotated among remote posts overseas and frequently experienced disruptive changes in their way of life.

> Mr. ROGERS of Massachusetts. * * * I think the analogy of the foreign service officer to the Army officer and to the naval officer is much more complete than to the civil-service employee in Washington.
>
> The foreign-service officer is going hither and yon about the world, giving up fixed places of abode, often rendering difficult and hazardous service of prime importance to the United States.
>
> * * * * *
>
> Mr. CELLER. You are making the retiring age 65 years?
>
> Mr. ROGERS of Massachusetts. Sixty-five.
>
> Mr. CELLER. And the clerk in Washington in the field service is retired at 70 years of age?
>
> Mr. ROGERS of Massachusetts. There is added a provision that the Secretary of State may retain any man for five years if he finds it wise for the country so to retain him.
>
> I call to the attention of the gentleman the fact that the kind of service which these men must render involves going to the Tropics; it involves very difficult and unsettling changes in the mode of life. The consensus of opinion was that the country was better off to retire them, as a general rule, at 65. [Applause.] [15]

The 1924 Act has been amended several times,[16] but Congress has adhered to its determination that Foreign Service employees should be required to retire at a lower age than civilian employees generally. In 1941, for example, Congress authorized the Secretary of State to compel the retirement at full pension of Foreign Service Officers who were at least 50 years old and had rendered 30 years' service, or to compel the retirement at partial pension of Officers who were at least 50 and had rendered 15 years' service (55 Stat. 189). This provision has since been repealed (60 Stat. 1038), but its legislative history demonstrates Congress' consistent assessment of the effects of overseas work on Foreign Service personnel. Both the House and Senate committee reports reprinted a letter from Secretary of State Hull, which stated (S. Rep. No. 168, 77th Cong., 1st Sess. 2 (1941); H.R. Rep. No. 389, 77th Cong., 1st Sess. 3 (1941)):

> Whereas it is well known that in all walks of life the age at which different individuals no longer find it possible to continue their maximum

---

[15] Some members of Congress opposed the lower retirement age established in the Rogers bill and offered an amendment that would have set the mandatory retirement age for Foreign Service Officers at 70. The amendment was rejected. 65 Cong. Rec. 7586 (1924).

[16] Indeed, the Act was completely rewritten in 1946, and the mandatory retirement age for Foreign Service Officers was lowered to 60 (60 Stat. 1015). See pages 26-31, *infra*.

volume of work and activity, or to carry heavy responsibility with effectiveness, varies materially, experience has shown that the continued strain of 30 years or more of service representing this Government in foreign countries in widely different climates and environments makes it desirable both from the standpoint of the Government and of officers that retirements should be authorized by law, commencing at a minimum of 50 years of age.

* * * [T]he Foreign Service is in many respects the most hazardous of the permanent commissioned services of this Government, when this country is not actually engaged in war. Foreign Service officers and their families are, even when the United States is at peace, not only subject to unhealthful conditions and extremes of climate (often without having suitable medical facilities available) but they are also subject to all the dangers of foreign wars, of civil strife in foreign countries, and of major catastrophes. * * *

The special nature of Foreign Service work was similarly emphasized in the 1954 report to Congress by the Committee on Retirement Policy for Federal Personnel, a statutorily created body (66 Stat. 723) charged with the responsibility of making a comparative study of all retirement systems for all federal employees. Congress directed the Committee to include in its report an evaluation of "the necessity for special benefit provisions for selected employee groups, including overseas personnel" (*ibid.*). The Committee mentioned the lower compulsory retirement age of Foreign Service Officers and noted that this and

other distinctive provisions had been "enacted in recognition of the needs of a career service and of the disadvantages of employment abroad." S. Doc. No. 89, 83d Cong., 2d Sess. 21 (1954). The Committee also provided a more detailed description of the unusual factors that had prompted Congress to confer preferential retirement treatment on Foreign Service employees. The Committee stated (*id.* at 280-281):

> Foreign Service as compared with service in the United States has many disadvantages which may be grouped in three categories. (1) Financial, (2) occupational hazard, and (3) post-retirement.
>
> * * * * *
>
> Disadvantages arising out of occupational hazards relate to such matters as unfavorable climate; lack of proper health facilities; exposure to diseases; risks arising out of foreign wars, riots, insurrection, and civil commotion and sometimes assault or assassination.
>
> Psychological pressures, especially for employees with families, are frequently built up as a result of encountering and combating such hazards. They may also arise out of such factors as the repeated readjustment for the employees and their families to new environments—particularly where unfamiliarity with the local language and customs adds a complication—and continuous lack of private life and opportunity for relaxation because of the unavoidable "goldfish bowl" existence.

See also *id.* at 238-239, 273-274; Committee Print, House Committee on Foreign Affairs, The Foreign

Service—Basic Information on Organization, Administration, and Personnel, 84th Cong., 1st Sess. 105-116 (1955).

2. As originally designed, the Foreign Service Retirement System covered only Foreign Service Officers in the Department of State. Congress extended the coverage of the Foreign Service Retirement System between 1960 and 1976. It now includes not only persons at the Officer level in the International Communication Agency and the Agency for International Development, but also Foreign Service staff employees at the State Department, ICA, and AID.[17] The vast majority of Foreign Service personnel are now entitled to benefits under the Foreign Service Retirement System. While it was expanding the system's coverage, Congress periodically reaffirmed its earlier conclusion that Foreign Service employees should be subject to an earlier mandatory retirement age than Civil Service employees.

For example, in 1960, when a large group of technical, administrative, fiscal, clerical, and custodial employees of the Foreign Service were transferred into the Foreign Service Retirement System, Congress noted that this system "is designed to give recognition to the need for earlier retirement age for career Foreign Service personnel who spend the majority of their

[17] 74 Stat. 838; 82 Stat. 812, 814; 87 Stat. 722-723; Pub. L. 94-350, 90 Stat. 834, 842.

working years outside the United States adjusting to new working and living conditions every few years." [18]

A 1966 Cabinet Committee study of federal staff retirement systems, submitted to Congress as an appendix to the annual report of the Bureau of the Budget and the Civil Service Commission on federal statutory salary systems, contains a similar discussion. S. Doc. No. 14, 90th Cong., 1st Sess. (1967). That study states (*id.* at 112):

> The mandatory retirement age of 60 is set in recognition of the need to maintain the Foreign Service as a corps of highly qualified individuals with the necessary physical stamina and intellectual vitality to perform effectively at any of some 300 posts throughout the world including those in isolated, primitive, or dangerous areas.

The decision to extend the Foreign Service Retirement System to career Foreign Service employees of the International Communication Agency in 1968 and the Agency for International Development in 1973 also demonstrates congressional recognition of the special stresses of an overseas career. The House report on the latter measure declared that the Foreign Service Retirement System "provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service." [19]

[18] H.R. Rep. No. 2104, 86th Cong., 2d Sess. 31 (1960).

[19] H.R. Rep. No. 93-388, 93d Cong., 1st Sess. 46 (1973). Referring to the special characteristics of AID's statutory mission, the report also stated (*id.* at 48): "AID operates only in the less developed countries. Hence its Foreign Ser-

Finally, congressional sensitivity to the unique requirements of the Foreign Service is reflected in the exclusion of Foreign Service employees from the 1978 amendments to the Age Discrimination in Employment Act (see note 5, *supra*). Those amendments repealed the statutory provision that had required most Civil Service employees to retire at age 70 (5 U.S.C. 8335(a)). The bill originally introduced in the House would have amended Section 15(a) of the Age Discrimination in Employment Act, 29 U.S.C. (Supp. V) 633a(a), to read: "Notwithstanding any other provision of Federal law relating to mandatory retirement requirements * * *, all personnel actions affecting employees * * * in executive agencies * * * shall be made free from any discrimination based on age" (H.R. 5383, 95th Cong., 1st Sess. 5 (1977); see H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 5-6, 11-12 (1977)).[20] If it had been adopted, this proposal would have eliminated mandatory retirement ages not only

---

vice personnel spend almost their entire working years in posts that are designated hardship posts. The transfer of its personnel to the Foreign Service Retirement System should encourage those who meet the age and service requirements to seek earlier retirement."

[20] In addition, the bill would have amended Section 15(b) of the Act, 29 U.S.C. (Supp. V) 633a(b), to preclude the Civil Service Commission from granting any exemption that would permit any department or agency "to observe the terms of any seniority system or any employee benefit plan such as a retirement, pension, or insurance plan, if such system or plan includes any provisions which require the retirement of any employee because of the age of such employee" (H.R. 5383, *supra*, at 5-6).

in the Foreign Service, but also in the Central Intelligence Agency, the Postal Service, the Federal Aviation Agency, and a number of other federal entities.

During debate on the floor of the House, Rep. Spellman introduced an amendment intended generally "to avoid the possibility of wholesale error in dealing with erasing mandatory age requirements" and, in particular, to "leave intact the existing retirement provisions applicable to Foreign Service personnal [sic]" (123 Cong. Rec. H9969 (daily ed., September 23, 1977)). Rep. Zablocki, Chairman of the House Committee on International Relations, spoke in support of the Spellman amendment and asserted his committee's "primary jurisdiction" over the Foreign Service. He pledged that the Committee on International Relations would "review the retirement provisions affecting the Foreign Service at the earliest possible date" (*ibid.*). The Spellman amendment was adopted, and only the mandatory retirement provision applicable to the Civil Service was repealed (*ibid.*; see H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 10-11 (1978)).

3. Congress has thus repeatedly articulated a rational basis for establishing a special mandatory retirement age for Foreign Service personnel and has recently demonstrated its intention to continue to treat Foreign Service retirement issues separately from retirement issues concerning other federal employees. The legislative judgment that the Foreign Service should be covered by a distinct retirement system that includes a mandatory retirement age of 60 is amply

supported by an examination of the characteristics of a Foreign Service career. Foreign Service Officers must be physically and mentally prepared to make difficult discretionary decisions that may affect the foreign relations of the United States. The perils and discomforts to which Foreign Service personnel are exposed have not materially diminished since 1941 when Secretary Hull wrote of the "unhealthful conditions," the "extremes of climate," and the "dangers of foreign wars, of civil strife in foreign countries, and of major catastrophes" (see page 16, *supra*). American diplomatic missions have been established in an increasing number of disadvantaged countries, and the threat of terrorist activity has grown in many areas. State Department statistics indicate that there are now 187 hardship posts to which Foreign Service personnel may be assigned and that a typical Foreign Service career employee can expect to spend approximately one-fourth of his or her working years at such posts.[21] Of the Foreign Service personnel abroad at any given time, nearly 50 percent are serving in hardship locations.

The Foreign Service is unique in the worldwide mobility of its employees. They must be ready to serve anywhere and are required by law to devote a substantial part of their careers to overseas duty. Approximately 60 percent of all Foreign Service em-

[21] Because AID maintains a higher percentage of hardship posts than the State Department or ICA, AID Foreign Service employees can expect to spend a greater portion of their careers—approximately one-half—in such difficult locations.

ployees are overseas at any given time.[22] Under Section 571 of the Foreign Service Act, 22 U.S.C. 961, Foreign Service employees may be assigned to domestic posts for more than eight consecutive years only on the personal decision of the Secretary of State.[23] Foreign Service employees must be on call to relocate, to hazardous places, at a moment's notice. They must serve in hardship posts whenever the needs of the Service dictate, not when they choose.

There is no similar presumption that persons in any of the employment categories cited by the district court (J.S. App. 4A-6A) will serve overseas for extended periods. Peace Corps volunteers are not career employees; in fact they are not government employees at all, except for very limited purposes. The Foreign Agricultural Service has only a few employees overseas, and they serve abroad at their option.[24]

[22] Defendants' Response to Request for Information, Exh. 5.

[23] Section 571, 22 U.S.C. 961, provides: "Any officer or employee of the Service may, in the discretion of the Secretary, be assigned or detailed for duty in any Government agency, * * * such an assignment or combination of assignments to be for a period of not more than four years, except that under special circumstances the Secretary may extend this four-year period for not more than four additional years: *Provided*, That in individual cases when personally approved by the Secretary further extension may be made." The Department of State is a "Government agency" within the meaning of this statute. See H.R. Rep. No. 2508, 79th Cong., 2d Sess. 74-76 (1946).

[24] 286 Department of Agriculture employees were located in foreign countries in 1975; only 82 of these were in hardship posts. Defendants' Supplementary Memorandum with Respect to Defendants' Response to Request for Information, pp. 4-6. 4,611 participants in the Foreign Service Retirement System

Similarly, persons who work for the Agency for International Development on a contract basis have no career obligations and are not required to remain overseas for longer than the contract period. Approximately 30,000 Civil Service employees work overseas for the Department of Defense, but departmental regulations limit the overseas tenure of most of these employees to five years.[25] The percentages of Civil Service and Foreign Service employees overseas at any given time differ by an order of magnitude.[26]

Congress thus had good reason to create a separate Foreign Service Retirement System with a mandatory

---

were abroad in 1975 (Defendants' Response to Request for Information, Exh. 5). Currently, approximately 6,700 participants in the Foreign Service Retirement System are serving abroad. The major portion of this increase is attributable to the Foreign Service Retirement Amendments of 1976 (90 Stat. 834, 846-847), which repealed the requirement that Foreign Service staff employees accumulate ten years of continuous service as a precondition to coverage under the Foreign Service Retirement System (see 22 U.S.C. (1970 ed.) 1063(c), 1229(b)).

[25] Department of Defense Instruction 1404.8 (1968).

[26] The district court's opinion suggests (J.S. App. 4A-5A) that there are approximately 50,000 American civilians who work for the government abroad and who are not covered by the Foreign Service Retirement System. The United States Civil Service Commission Preliminary Report on Civil Service Retirement (Fiscal Year 1977) indicates that the actual figure is twice that large and that, if employees in United States Territories are considered, the figure rises to 134,000 (see Table A-6). The Report also indicates, however, that the total number of Civil Service employees is approximately 2.85 million (*ibid.*). Thus, the percentage of Civil Service employees overseas is at most 4.7 percent. That is not remotely comparable to the corresponding 60 percent figure for Foreign Service personnel.

retirement age lower than that applicable to the Civil Service. The decision to place that age at 60 is no more objectionable than the decision of Massachusetts, upheld in *Murgia*, to require uniformed state police officers to retire at age 50. Increasing age brings with it increasing susceptibility to physical difficulties, and the fact that the individual appellees may be able to perform their tasks is no more dispositive here than in *Murgia*. In recognition of the special features of Foreign Service work, Congress determined that the use of a mandatory retirement age "rationally furthers some legitimate, articulated state purpose" (*McGinnis* v. *Royster*, 410 U.S. 263, 270). That conclusion is a permissible exercise of legislative judgment; it should not be overturned on judicial review because a court disagrees, as a policy matter, with Congress' decision. See, *e.g.*, *Whalen* v. *Roe*, 429 U.S. 589; *Weinberger* v. *Salfi*, 422 U.S. 749.

The most that can be said for appellees' position is that Congress also might have had good reason to require all federal employees who spend significant portions of their careers abroad to retire at 60.[27] But that would have created awkward problems for the administration of the Civil Service and its retirement system, and Congress is not constitutionally required to prescribe a special retirement age for these employees in order to be able to deal effectively with the Foreign Service. Congress may attend to the special

---

[27] Indeed, in its successive expansions of the coverage of the Foreign Service Retirement System, Congress has required early retirement for identifiable groups of overseas employees whose service abroad is of a character and duration similar to that of Foreign Service Officers in the Department of State.

problems facing the Foreign Service without imposing similar measures everywhere else they may be desirable or appropriate. See *Califano* v. *Jobst*, 434 U.S. 47, 56-58; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

B. Congress has established a lower mandatory retirement age for Foreign Service employees as part of a special personnel management system designed to ensure a high level of competence in the United States diplomatic corps.

In the Foreign Service Act of 1946, 60 Stat. 999, Congress introduced a new personnel structure within the Foreign Service and, concomitantly, revised the Foreign Service Retirement System. The reform was intended to produce a "disciplined and mobile corps of trained men * * * through entry at the bottom on the basis of competitive examination and advancement by merit to positions of command." H.R. Rep. No. 2508, 79th Cong., 2d Sess. 1 (1946). Congress sought to provide for "more rational and effective deployment of personnel according to natural aptitude, training, interest, and experience" and thereby to end the existing "conspicuous waste of manpower." *Id.* at 3. The basic tool chosen by the legislature to accomplish these purposes was the "rank-in-person" structure of the Foreign Service.

The grade assigned to a Civil Service employee depends directly on the job description of the position in which he or she is employed. Foreign Service Officers, by contrast, are classified on the basis of "a definition of the qualifications expected of officers of a given class and the level of responsibility at which

they will be required to work." *Id.* at 7. Rank attaches to a given Officer rather than to a given job. Foreign Service Officers are hired not to fill a particular post, but for their long-term career potential. They are promoted by merit from rank to rank as they gain experience. The system is characterized by frequent transfers from job to job and country to country; it is designed not just to ensure that necessary tasks are performed but to develop leaders through exposure to varied experiences and steadily more difficult challenges. The system prepares and helps to identify the best Officers for service at ambassadorial and other high levels.

As part of the 1946 restructuring, Congress created a "selection-out" procedure for Foreign Service Officers. Officers are ranked in "classes" and required to retire if they do not secure promotion within a specified number of years. The "selection-out" device is intended to "force attrition in a career service at a more rapid rate than is achieved by ordinary retirements" in order to guarantee "that Foreign Service officers shall be promoted by selection on the basis of merit." H.R. Rep. No. 2508, *supra*, at 85. Each year selection boards are convened under Section 623 of the Act, 22 U.S.C. 993, to make a worldwide comparison within each class of Foreign Service Officers, Foreign Service Information Officers, and Foreign Service Reserve Officers with unlimited tenure and to identify those ready for promotion to the next rank. Officers whose performance has fallen substantially below that of their peers or who have failed to achieve promotion

within the time allotted may be selected out, as Section 633 of the Act, 22 U.S.C. 1003, and the Secretary's regulations provide.

In the 1946 personnel system revision, Congress reduced to 60 the mandatory retirement age for Foreign Service Officers below the rank of career minister.[28] The new retirement age corresponded to the approximate age projected for the most senior Officers in Class 1, the rank immediately below career minister. H.R. Rep. No. 2508, *supra*, at 92. Class 1 Officers were not subject to selection-out, because the mandatory retirement provisions were expected to produce the desired turnover in that class. *Id.* at 91.[29]

The legislative history reveals that Congress followed the model of the United States Navy in devising the new Foreign Service personnel system. This Court described the Navy's statutorily created system of promotion and attrition, embodying the same "up or out" philosophy reflected in the Foreign Service's selection-out system, in *Schlesinger* v. *Ballard*, 419 U.S. 498. In sustaining the Navy's program, this Court noted that, without mandatory attrition devices, younger officers would not often be promoted and an

[28] Under the 1946 statute, career ministers remained subject to mandatory retirement at age 65. In the Foreign Service Retirement Amendments of 1976, Pub. L. 94-350, 90 Stat. 846, the mandatory retirement age for career ministers was lowered to 60.

[29] Class 1 officers were made subject to selection-out in 1955 (69 Stat. 25-26). In 1955 Congress also created a new class of Foreign Service Officers called "career ambassadors," one rank above career ministers. The mandatory retirement age for career ambassadors was fixed at 65 (69 Stat. 537).

important incentive to superior performance would be removed. *Id.* at 502. The Court further observed that operation of the "up or out" program "results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command." *Id.* at 510.

The Foreign Service Retirement System uses both selection-out and the mandatory retirement age to help it build and maintain a high-quality diplomatic corps. Neither part of the system is sufficient by itself. The selection-out program has its major effects on younger employees, and the mandatory retirement age creates "room at the top" so that there is a steady supply of promotion opportunities for the younger employees who must be promoted to stay in the service.[30]

As suggested previously (see note 9, *supra*), in light of the recent amendments to the Age Discrimination in Employment Act, appellees' contention that a mandatory retirement age applicable to the Foreign Service must be identical to that applicable to the Civil Service is essentially an argument for eliminating the Foreign Service mandatory retirement age altogether. Such a development, or even postponement of mandatory Foreign Service retirement until age 70,

[30] As the court of appeals observed in *Johnson* v. *Lefkowitz*, 566 F. 2d 866, 869 (C.A. 2), "[a] mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and to progress through the ranks."

would detract significantly from the continued effectiveness of the Retirement System in personnel management.

Statistics compiled by the Department of State show that as of June 30, 1978, there were 110 members of the Officer corps of AID, ICA, and the State Department who had reached age 60 and who would have been subject to mandatory retirement but for the district court's order. Projections indicate that this figure will reach 159 by December 31, 1978. As more Officers postpone their retirement beyond age 60, the opportunities available for advancement within the ranks of the Foreign Service decrease. The fewer such opportunities are available, the fewer promotions are available for younger Officers and the less useful selection-out becomes as a means of encouraging and rewarding superior performance and of attracting the most able applicants to Foreign Service careers. In short, the Foreign Service personnel system is an integrated whole, and in order for selection-out to work as it should, it must be accompanied by the mandatory retirement age set by Congress.[31]

---

[31] Moreover, mandatory retirement may sometimes serve as a more palatable alternative to selection-out where the latter course, though objectively indicated, appears too harsh in an individual case for a long-term employee. When a senior Officer is no longer performing at an acceptable level but is nearing mandatory retirement, the selection-out procedures may be held in abeyance with no irreparable detriment to the Service and no loss of face to the employee who has rendered years of valued service. As the 1966 Cabinet Committee study of federal retirement systems concluded, "Retirement at age 60 * * * enhances the advancement opportunities of the most effective younger personnel and reduces the strain on the selection-out program * * *." S. Doc. No. 14, 90th Cong., 1st Sess. 112 (1967).

It was therefore rational for the legislature to conclude that normal attrition, even when supplemented by selection-out and inducements to early voluntary retirement, would not ensure satisfactory promotion prospects throughout the system. Experience in the brief period following the district court's decision has confirmed the accuracy of Congress' judgment. Promotions, especially at the upper levels of the Foreign Service, have slowed drastically, because persons who were expected to retire have not done so. The longer this situation persists, the greater the difficulty the Foreign Service will experience in retaining competent mid-level Officers and in recruiting highly qualified persons to enter the Service at the bottom. Congress set the mandatory retirement age for Foreign Service Officers at 60 because it determined that, by that age, most Officers would have attained their highest career positions and served in them for several years. The legislature thus sought to obtain the maximum possible benefit from the talent and experience of each individual Officer while at the same time honoring the Service's institutional need for continued turnover in upper echelon positions. The choice is rational and should be sustained.

C. Appellees' selective challenge to a single allegedly undesirable feature of the Foreign Service Retirement System disregards the numerous special advantages conferred on Foreign Service personnel under that system.

The Civil Service and Foreign Service retirement systems are different in many respects other than mandatory retirement age. For example, retired Foreign Service employees receive an annuity computed at two percent of the highest average salary for three consecutive years, multiplied by the number of years of service; retired Civil Service employees, by contrast, receive an annuity computed at 1½ percent of salary for the first five years of service, 1¾ percent for the next five years, and two percent for the remaining years. Compare 22 U.S.C. 1076 with 5 U.S.C. 8339(a). Foreign Service personnel with 20 years' service may elect to retire at age 50, but Civil Service employees with 20 years' service cannot normally retire until age 60. Compare 22 U.S.C. 1006 with 5 U.S.C. 8336. For a full comparison of the features of the Foreign Service and Civil Service retirement systems, see United States Civil Service Commission Report, *Income Protection Programs for Federal Employees*, Pt. 3, 39-59 (1977).[32]

---

[32] In addition to the numerous differences between the two retirement systems, there are a variety of other noteworthy distinctions between Foreign Service employment and Civil Service employment. Perhaps the most obvious of these are the different pay scales and promotion patterns that apply in the two services.

Foreign Service pay ranges from $8,902 to $58,245 annually, whereas Civil Service pay ranges from $6,219 to $58,245. Executive Order No. 12010, 42 Fed. Reg. 52365. (Under 5 U.S.C. 5308, however, the pay actually received may not exceed $47,500.) The Civil Service does not use selection-out or any comparable personnel management tool. On the other hand, the percentage of Foreign Service Officers in the highest pay classes exceeds the percentage of Civil Service employees in the highest pay grades. Indeed, the Department of State has computed that the proportion of Foreign Service Officers in the two highest pay steps exceeds the proportion of Civil Service employees in the three highest pay steps.

The Foreign Service also has its own personnel grievance system (22 U.S.C. 1037-1037c), its own statutory procedure for separation for cause (22 U.S.C. 1007), and its own unique employee-management relations program under Executive Order 11636, 36 Fed. Reg. 24901.

The retirement benefits available to Foreign Service personnel have been adjusted in part to take account of the early mandatory retirement feature of the Foreign Service Retirement System.[33] Appellees, apparently satisfied with the remaining aspects of Foreign Service employment, have challenged only the statutory requirement that they and other Foreign Service personnel retire at age 60. The present case thus represents an attempt by some Foreign Service

---

[33] In 1954 the independent Committee on Retirement Policy for Federal Personnel reported to Congress that it generally preferred increased active duty pay and allowances to special retirement benefit plans as a way of compensating employees for hazardous or arduous duties or service at inconvenient or unhealthful locations. The Committee conceded, however, that where a formally established personnel system provides for involuntary separation in the interest of the government, either through "promotion and selection-out" procedures or through mandatory retirement at a relatively young age, special benefit provisions might be appropriate. See S. Doc. No. 89, 83d Cong., 2d Sess. 18 (1954).

employees to improve their lot by eliminating a condition of employment that they see as less favorable than the comparable Civil Service rule, while retaining the conditions of employment that are more favorable than the comparable Civil Service conditions.

The district court, observing that the overseas careers of some civil servants are similar to those of foreign servants, ruled that Congress could not constitutionally maintain different mandatory retirement ages for the two groups. This reasoning would apply equally to any of the terms or conditions of employment as to which the Civil Service and Foreign Service differ. If upheld, the district court's decision could lead to invalidation on equal protection grounds of all distinctions between the Civil Service and the Foreign Service. The decision thus calls into question the constitutionality of legislation creating a separate Foreign Service, with its own combination of benefits and obligations.

Whenever Congress establishes a separate service,[34] there are bound to be some differences in the terms and conditions of employment between that service and the regular Civil Service. Promotion patterns will be different; pay will be different; retirement is likely to be different. These differences can and often do offset each other, so that each group of employment

[34] In addition to the Foreign Service and the military services, the Postal Service, the Public Health Service, the Central Intelligence Agency, and several other special services have been established by Congress.

benefits and obligations is of approximately equal attractiveness to employees. Unless it is possible to conclude that all such distinctions are irrational—indeed, that decisions to create such separate services are irrational—it is insupportable for the district court to have "corrected" the one condition to which appellees object without regard to the other conditions in the Foreign Service employment "package" that appellees enjoy.[35] But, for the reasons discussed above, it was not irrational for Congress to determine that the Foreign Service and the Civil Service should be treated differently in some respects.

[35] Cf. *Kelley* v. *Johnson*, 425 U.S. 238, which holds that governments have especially broad powers in regulating the terms of their dealings with their own employees. Here, as in *Kelley*, the particular rule to which appellees object "cannot be viewed in isolation, but must be rather considered in the context of the [nation's] chosen mode of organization for its [Foreign Service]" (*id.* at 247).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

PETER BUSCEMI,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys.

HERBERT J. HANSELL,
Legal Adviser,
Department of State.

MICHAEL A. GLASS,
General Counsel,
International Communication Agency.

JULY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269803 75

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLEES

ZONA F. HOSTETLER
BRUCE J. TERRIS
EDWARD H. COMER
1526 - 18th Street, N.W.
Washington, D.C. 20036
(202) 332-1882

Attorneys for Appellees

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE APPELLEES

STATEMENT

This case involves an appeal from the unanimous decision of the three judge court below (Robb, Circuit Judge, and Gesell and Flannery, District Judges) that Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1002, which requires retirement at age 60 for those employees covered by the Foreign Service Retirement System, violates the equal protection guarantees of the Constitution, and that Foreign Service employees cannot be mandatorily retired before the age of 70. This retirement provision applies to employees of the State Department, the International Communication Agency (ICA) (formerly the

United States Information Agency (USIA)) and the Agency for International Development (AID) who are covered by the Foreign Service Retirement System.

As originally enacted in 1946, Section 632 applied only to Foreign Service officers (a small group of employees performing primarily political and diplomatic duties) but over the years the Foreign Service system was expanded to include other State Department employees such as personnel managers, secretaries, librarians, and technicians. USIA teaching, cultural, and information employees were added to the system in 1968 and AID Civil Service employees in 1973.

It is undisputed between the parties that the approximately 10,000 employees who are covered by the Foreign Service retirement system hold a wide variety of jobs.[1] Some are Foreign Service officers in the State Department. These officers specialize in one of four cones: economic, administrative, consular or political. Depending on his or her specialty, at age 60 an officer may be performing (1) economic research and analysis; (2) personnel recruitment, management or other administrative functions; (3) visa and other consular work; or (4) political research, analysis, and negotiations with representatives of foreign governments.

Some of these employees are ICA officers whose jobs range from performing cultural, lecturing, and other information duties, to performing administrative and personnel management functions. Cultural officers es-

[1] Descriptions of the varied jobs performed by Foreign Service employees are set forth in voluminous materials made available to appellees in response to Interrogatory 4.

tablish liaison in other countries with universities and scholarly groups and with symphonies, museums, and other cultural organizations. They also maintain libraries, and arrange for exchanges of students and scholars and for tours of foreign countries by American artists. Information officers establish liaison with the media in other countries, prepare press releases, prepare and distribute filmstrips and maintain film libraries. ICA personnel also provide the staffing for the Voice of America broadcasts and arrange for satellite programming.

Some of these employees are officers of AID which is concerned with providing economic and technical assistance to other countries.

Finally, some of these employees are staff employees (rather than officers) in the State Department and at ICA and AID. These employees include secretaries, clerks, librarians, language teachers, radio and television engineers, and a wide variety of support personnel. Approximately 3,000 of the 9,000 employees in the State Department who are covered by the Foreign Service Retirement System are staff employees.[2]

It is undisputed between the parties that the vast majority of Foreign Service employees hold white collar jobs (teaching, cultural liaison, research, administrative, etc.) similar to those performed by white col-

[2] Appellants' response to Interrogatory 6 stated that as of Jan. 1, 1976, there were 9,031 employees in the State Department covered by the Foreign Service Retirement Systm of which 2,737 were staff employees. The USIA workforce consisted of 1,195 employees of which 143 were staff employees. No figures were furnished with respect to AID.

lar Civil Service employees who are not subject to mandatory retirement because of age.[3]

While the majority of Foreign Service employees serve some time abroad at overseas consulates, trade missions, ICA libraries, or other institutions, this is not true of all Foreign Service employees. Over 1,500 employees are assigned to work permanently within the United States (for example, the employees who are Foreign Affairs Specialists). Others spend the majority of their careers in the States. A sampling from the State Department's Biographic Register for 1974 discloses the wide variations in overseas service among employees and shows that Foreign Service employees who do work overseas spend an average of 15 years abroad (J.S.App. 7A).

Some of the years spent overseas by a Foreign Service employee are spent at embassies in underdeveloped or so-called "hardship" countries. When a country is designated by the United States Government as a "hardship" country, United States government personnel working in that country, including both Civil Service and Foreign Service personnel, are entitled to extra pay. A post may be classified as a "hardship" post for a wide variety of reasons—for example, because of the existence of climatic extremes, or poor quality housing and food in the local native markets, or the absence of adequate cultural amenities. One of the chief reasons for designating a post as a "hardship" post is the absence of adequate elementary and secondary schools for children (Pl. Exs. 3, 4; Ans. to Ints. 31, 32). However, most positions in the Service are in posts which are not designated as hardship ones such as Paris, London and Washington, D.C. Only 22% of State Department Foreign Service Officer positions, 11% of ICA officer positions and 11% of all nonofficer staff positions from all three agencies in the Foreign Service are at hardship posts (Webb. Aff., para. 2).

[3] Civil Service employees were subject to retirement at age 70 at the time this lawsuit commenced. However, Congress recently eliminated this requirement in the 1978 Amendments to the Age Discrimination in Employment Act, PL 95-256, Sec. 5 amending 5 U.S.C. 8335.

Under the Foreign Service Act, Foreign Service officers are subject to annual performance reviews and to selection out from the Service if they rank in the bottom percentages of their class or if they are not promoted within designated periods of time. Foreign Service staff employees are also subject to annual review for promotion purposes and to selection out for unsatisfactory performance but are not subject to selection out on the basis of failure to be promoted. All Foreign Service employees are given biennial medical examinations and are subject to medical selection out if they are unable to accept world-wide assignment. A condition of employment for overseas employees in the Foreign Service is that an employee accept assignment to any post in the world. All Foreign Service personnel have the option of voluntarily retiring with an annuity at age 50 after 20 years of service.

The average age of retirement has been age 55. Because of selections out, medical disqualifications, voluntary resignations, and voluntary retirements, few employees remain in the Foreign Service until their 60th birthday. As of February 28, 1976, there were only 51 officers and staff employees on the employment rolls of the State Department who had been born 59 years earlier (Pl. Ex. 5). The average number of mandatory

retirements of all employees each year in the five-year period from 1970 through 1974 was 44 (Ans. to Int. 2).

Appellee-employees brought suit in the District Court for the District of Columbia claiming a denial of the equal protection guarantees embodied in the Constitution on the ground that the age 60 mandatory retirement provisions failed to meet the rational basis standard of review enunciated by this Court and claiming a right to work until age 70. The appellant agencies filed a motion to dismiss, or, in the alternative, a motion for summary judgment. After submissions of evidence and briefs by the parties, and oral argument, the three-judge district court treated the case, with the consent of appellees, as if it had been submitted on cross-motions for summary judgment.

ARGUMENT

THE THREE JUDGE COURT PROPERLY CONCLUDED, ON THE BASIS OF THE RECORD BEFORE IT, THAT SECTION 632 OF THE FOREIGN SERVICE ACT OF 1946, WHICH REQUIRES FOREIGN SERVICE EMPLOYEES TO RETIRE AT AGE 60, LACKS A RATIONAL BASIS

I

A Classification Based on Age Violates the Equal Protection Guarantees of the Fifth Amendment Unless It Is Rationally Related to a Legitimate Governmental Objective

The three-judge court concluded on the basis of the legislative materials and factual evidence submitted by the parties that the Foreign Service Act of 1946 provision mandatorily retiring Foreign Service employees at the age of 60 violates the equal protection guarantees embodied in the Fifth Amendment.[4] In reaching

[4] The Fifth Amendment to the Constitution of the United States provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). See also *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).

this conclusion, the court simply, and properly, applied to the record before it the principles enunciated by this Court in those previous equal protection cases which applied the rational basis standard of review. *E.g., Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Trimble* v. *Gordon*, 430 U.S. 762 (1977).

In *Murgia*, this Court ruled that the proper standard for judicial review of a classification based on age is whether it is rationally related to a legitimate governmental objective (427 U.S. at 314). That case involved a challenge to a mandatory retirement age of 50 for the separate branch of the Massachusetts police comprised of uniformed street patrollmen.

This Court reviewed the factual evidence in the record and concluded, on the basis of that record, that a mandatory retirement age of 50 for uniformed policemen was rationally related to the legitimate government goal of protecting the public. It specifically found, for example, that members of the uniformed branch of the Massachusetts State Police were required to perform the most physically demanding and arduous police tasks and that the less physically demanding jobs, such as detective work, juvenile and women's work, and desk jobs, were handled by entirely separate branches of the State Police whose employees did not

have to retire until age 65 but whose positions were not available to members of the uniformed branch. *Id.* at 310, 315, n. 8. This Court noted that the uniformed branch officers participated in controlling prison and civil disorders, responded to emergencies and natural disasters, patrolled highways in marked cruisers, investigated crimes, apprehended criminal suspects and provided backup support for local law enforcement personnel. *Id.* at 310. The Court further stated that it had never been seriously disputed, if at all, that the work of the state uniformed officers was more demanding than that of other state, or even municipal, law enforcement personnel and that it was this difference in work that underlay the earlier retirement age for uniformed policemen. *Id.* at 315, note 8. The Court also pointed to the medical evidence in the record that established that the risk of physical failure, particularly in the cardiovascular system, increases with age and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group. *Id.* at 311. Since the factual record showed that the tasks of the uniformed police branch—controlling riots, apprehending criminal suspects, etc.—were inherently "stress" functions, the Court concluded that "[t]hrough mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police." *Id.* at 314. In short, this Court's holding in *Murgia* is clearly not that all age limitations are reasonable and constitutional but rather only that this issue must be determined on the basis of the record in the particular case.

The present case presents a wholly dissimilar factual situation to that in *Murgia*. This case involves a wide variety of jobs, nearly all of which are white collar desk

positions, and none of which involves physical protection of the public. As we will see, the record shows that there is no rational relationship between the mandatory retirement age of 60 and the work of the Foreign Service.

In the present case, the district court expressly recognized that the issue before it was whether the particular classification based on age was rationally related to a legitimate governmental objective. (J.S. App. 3A). The district court went on to state that the "rational basis standard" means that a legislative provision is "presumptively valid" and that its challengers have a "heavy burden in proving its invalidity" (J.S. App. 3A). The district court concluded: "On the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (J.S., App. 3A-4A). It properly did not conclude, as this Court did in *Murgia,* that heart attack or any other sudden incapacitating illness on the part of such personnel would present a threat to public safety.

II

The Record Does Not Support Appellants' Claim That Mandatory Retirement at Age 60 Is Rationally Related to Assuring Competence Because of the Uniquely Demanding Nature of Foreign Service Work Overseas

Appellants' principal claim in this case is that Foreign Service personnel work overseas at a variety of posts, that this work entails unusual physical and psychological difficulties, and that, because of these circumstances, their ability to carry out assignments after they reach the age of 60, particularly assignments at so-called "hardship posts", is diminished. They conclude that because of this uniquely demanding nature

of work overseas, mandatory retirement at age 60 is necessary to assure competence in the Foreign Service.

At the outset it should be noted that not all Foreign Service employees work overseas. Some 400 career employees, for medical reasons, family reasons, or other reasons, are not available for worldwide assignment (Ans. to Int. 22). In addition, Foreign Affairs Specialists, who are listed on the employment rolls as Foreign Service Reserve Officers, have not been required or expected to serve overseas even though they have been covered by the Foreign Service Retiremnt System and subject to mandatory retirement at 60.[5] At the present time, there are over 1,000 Foreign Affairs Specialists in the State Department, and an unknown number at ICA. *Department of State Newsletter,* March, 1978. Appellants' claim of a rational basis for the statute because of conditions overseas is, therefore, wholly inapposite to this group of Foreign Service employees.

Even as to those employees who spend some of their careers overseas, appellants have submitted no empirical evidence to support their claim. They have relied instead on conclusory statements in legislative materials, and on conclusory statements and personal opinions of their own personnel officers, that older Foreign Service employees are less able to perform work over-

[5] ICA personnel regulations dealing with foreign affairs specialists are set forth in Manual of Operations and Administration, V-A/V-B-1000, Sec. II, and in various circulars. Circular 487D, Dec. 19, 1977, deals with Domestic Specialists "who are assigned to a position in the United States and are expected to continue to serve in the United States." Appellees understand that foreign affairs specialists at ICA are currently being given the option to convert to Civil Service status and that an undetermined number are expected to do so. Those who do not will still be subject to mandatory retirement at age 60.

seas than younger employees because of the difficult conditions existing overseas (Gov. Ex. 2; Wortzel Aff.). Appellees, on the other hand, submitted extensive statistical, medical, and other documentary evidence, as well as affidavits, including affidavits of experts and disinterested persons, to refute appellants' claim and to demonstrate that there is in fact no correlation between working overseas in the Foreign Service and ability to perform that work between the ages of 60 and 70. Appellants did not deny the validity of most of appellees' factual submissions and did not submit evidence of their own to counter them.[6]

In this appeal, appellants (1) continue to maintain (Gov. Br. 12-26) that mandatory retirement at age 60 is necessary to ensure a competent workforce since competence to perform work overseas in the Foreign Service is diminished after the age of 60, and (2) claim (Gov. Br. 6) that the district court below erroneously decided the case on the basis of a record that was "limited".

We will now show (A) that the evidence in the record overwhelmingly demonstrates that there is no validity to appellants' claim of diminished competence even as to those employees working overseas; (B) that the evidence on this issue is adequate to support the district court's conclusion to that effect; (C) that the conclusory statements in the legislative materials cited by appellants are largely inapposite and, in any event, do not provide a factual basis for the retirement provision; and (D) that the district court properly applied

[6] As we will see, the only aspect of appellees' evidence that appellants even attempted to refute with statistical or other data was that relating to the number of Civil Service employees working overseas under conditions comparable to that in the Foreign Service.

the rational basis standard of review formulated by this Court to the record in this case.

A. The Uncontradicted Evidence in the Record Shows That There Is No Factual Basis for Appellants' Assertion That Mandatory Retirement at Age 60 Is Necessary to Assure Competence Because of the Uniquely Demanding Nature of Overseas Work in the Foreign Service

In this case, no empirical studies have ever been made concerning the nature of Foreign Service work similar to those relied on by the State of Massachusetts prior to establishing the mandatory retirement law for uniformed policemen which was challenged in *Murgia*. (427 U.S. at 314,316, notes 7, 9). No medical, statistical, or other objective evidence was compiled either before enactment of the mandatory retirement provision in 1946 (or before enactment of its earlier analogous provision relating to consular and diplomatic service officers in the Rogers Act of 1924) or in subsequent years as additional categories of employees were brought under the Foreign Service Act. Moreover, appellants have submitted none in this case.

Appellants rely here, as they did below, on conclusory statements concerning unfavorable conditions existing overseas that they have located in scattered fragments of legislative materials. As we will see in subsection (c) of this Argument, these legislative statements were not made in connection with the mandatory retirement provision and, in any event, are not based on any underlying studies or facts. Appellants have stated (Ans. to Int. 36) that beyond these legislative statements

> [t]he study which is specifically directed to the reasons and basis for the mandatory retirement provision as such is reflected in the letter of July 28, 1975, from the Director General of the Foreign Service to the Civil Service Commission (Gov. Ex. 2).

The letter to the Civil Service Commission gives a list of reasons why in appellants' opinion employees above the age of 60 do not have the necessary physical stamina and intellectual vitality to perform effectively their jobs. No medical, statistical, or other facts are cited as support for the opinions.[†]

Appellees submitted factual evidence to counter each and every allegation in appellants' letter to the Civil Service Commission. This point by point rebuttal is summarized in Plaintiffs' Memorandum in Support of Motion for Order Permitting Plaintiffs to Engage in Discovery and Present Further Evidence if Defendants' Motion to Dismiss is Denied and if Judgment for Plaintiffs Cannot Be Rendered on the Present Record, filed February 1, 1977. Appellees' evidence consisted of statistical and other documentary evidence based on information provided by appellants from Foreign Service records in response to interrogatories, the State Department's *Biographic Register* for 1974, and other published documents, and the published statistics and records of other government agencies. Appellees also

---

[†] Subsequently, in response to the district court's request for additional evidence concerning the factors underlying the retirement provision, appellants submitted the affidavit of their personnel director, Arthur Wortzel, which repeated some of the statements in the letter to the Civil Service Commission and set forth his opinion that those statements were correct. Again, no factual evidence was cited to support that opinion.

submitted affidavits from Dr. David Kessler, a former member of the medical staff of the Foreign Service, from Dr. Joseph English, the former Chief Psychiatrist for the Peace Corps and later an Assistant Secretary of Health, and from Dr. Alfred Munzer, a pulmonary specialist. Appellees also submitted an affidavit from Thomas Fox, executive director of Volunteers in Technical Assistance, a non-profit organization which provides technical assistance to countries throughout the world, and from Ambassador Barall, a former career Foreign Service officer. The affidavits of several of the plaintiffs in this case were also submitted.

Appellees' evidence demonstrates, *inter alia,* that working overseas generally, and working overseas in the Foreign Service specifically, does not impair the ability of older Foreign Service employees to perform their jobs to any greater extent than it does that of younger employees (Kessler Aff., para. 3; Fox Aff., para. 3); that, indeed, Foreign Service employees are less likely to be disqualified from overseas assignments than are younger members with young families (Barall Aff., paras. 2, 4); that older employees between the ages of 55 and 60 service in hardship posts in approximately the same proportion as do all employees (Webb Aff., paras. 2, 3); and that there is no medical relationship between aging and the ability to live and work in countries that are underdeveloped or have climatic extremes. (Munzer Aff., paras. 2-4).

Appellants submitted no evidence in response to these submissions by appellees. Here, on appeal, they merely repeat some of the unsupported allegations made below. For example, appellants allege (Gov. Br. 22) that "the perils and discomforts to which Foreign Service personnel are exposed have not materially di-

minished since 1941 when Secretary Hull wrote of the 'unhealthful conditions' [and] the 'extremes of climate'." Appellants cite no evidence for this statement. The undisputed medical evidence in the record, however, is that world health standards have improved (Munzer Aff., para. 3). In addition, the undisputed medical evidence in this record is that Foreign Service personnel are generally in good health, are innoculated before going overseas, and, with the exception of dysentery, do not usually contract the infectious diseases still prevalent abroad. (Kessler Aff., para. 2; Munzer Aff., para. 3). This has also been the practical experience of Foreign Service officials who have served in underdeveloped countries (Barall Aff., para. 6). In any event, the undisputed medical evidence in the record is that none of the specific diseases or illnesses set forth in the letter to the Civil Service Commission as a basis for mandatory retirement—undulant fever, dysentery, hepatitis, typhoid, and tuberculosis—are age-related, and to the extent they do occur, they occur to Foreign Service employee and their dependents at all ages (Kessler Aff., para. 2; Munzer Aff., para. 3). The undisputed medical evidence submitted by appellees from a pulmonary specialist is that there is no medical relationship between aging and the ability to live and work in countries that have extremes of climate or atmosphere and that, in addition, respiratory ailments are more likely to develop or be aggravated in individuals living and working in Washington's highly polluted summer climate than they are to develop or be aggravated in most underdeveloped countries or countries having high altitudes (Munzer Aff., paras. 2, 4). The affidavit of Ambassador Barall also notes that, even in the most remote posts, Foreign Service employees live and work in well heated and air-

conditioned facilities. Moreover, the undisputed evidence in the record is that, since the original establishment of the Foreign Service, medical facilities have been established at nearly every post sufficient to take care of usual health problems. In addition, when specialized care is needed, the government provides transportation by air ambulance to major medical centers at no cost to Foreign Service employees (a service not ordinarily provided Civil Service employees working in the United States) (Barall Aff., para. 3; Wells Aff., para. 4; Cardoso Aff., para. 2).

Amicus American Foreign Service Association alleges (AFSA Br. 12) that medical problems may be cumulative after long years of overseas service, but cites no evidence that medical problems accumulate as a result of working overseas. The undisputed medical evidence in the record is that longterm medical condition is not ordinarily affected by occurrences of diseases still prevalent in some parts of the world (Munzer Aff., para. 3).

Moreover, not all overseas tours are spent in underdeveloped countries or other posts designated as hardship locations. Many overseas tours are spent in such non-hardship posts as Rome, Paris, and Nassau. In fact, the record shows that only 22% of all Foreign Service officer positions, 11% of all ICA officer positions, and 11% of all staff positions are at hardship posts (Webb. Aff., para. 2, summarizing Ans. to Ints. 29-33).[8] Appellants now assert (Gov. Br. 22) that of the Foreign Service personnel abroad at any given time, nearly 50% are serving in hardship locations, but cite no authority for this statement. Even if we assume,

[8] By way of contrast, 80 of 286 Agriculture Department employees overseas in 1975 (or 28%) were located at hardship posts.

arguendo, that this statement is true, it does not show that Foreign Service employees suffer cumulative effects because of such service. Foreign service employees who are unable to perform the work of the Service because of health problems are separated on that account but the evidence shows that medical separations occur at all ages. (Ans. to Int. 16). No employee is sent to a hardship post unless he or she has first been medically cleared for the assignment (Ans. to Int. 35). Presumably, if older employees are less able physically than younger ones to perform work overseas at hardship posts because of the cumulative effects of work in the service, the record would show that they are assigned less often to such posts. However, the evidence shows that older employees between ages 55 and 60 serve at hardship posts in approximately the same proportion as younger employees (Webb Aff., para. 2-3). The affidavit of appellants' personnel director, Arthur Wortzel, states that replacement of Foreign Service personnel at overseas posts is costly to the Service but cites no evidence that older Foreign Service workers (who, like younger employees, receive prior medical clearance for specific overseas assignments) are more likely to require replacement than younger employees. In fact, the uncontradicted statement of Dr. Kessler, a former physician on the Foreign Service medical staff, is that while occasionally Foreign Service employees need to be evacuated to major medical facilities for specialized care,

(Def. Supp. Mem. with Respect to Def.' Response to Request for Information, pp. 4-6).

this event occurs to employees, and their dependents, at all ages (Kessler Aff., para. 3).[9]

Assuming, *arguendo,* the validity of appellants' statement (Gov. Br. 25) that increasing age brings with it increasing susceptibility to physical difficulties, there is no evidence in this record that such susceptibility interferes in any significant way with accomplishing the work of the Service. As a matter of logic, this argument of appellants would justify mandatory retirement of thirty year olds in favor of teen-agers irrespective of any capability of thirty year olds to perform the work involved. Unlike the situation in Murgia, the physical demands of the Foreign Service do not require youth, nor would sudden incapacitating illness present any risk to public safety.

Appellants further allege (Gov. Br. 22) that "the dangers of foreign wars [and] of civil strife" continue to exist in the Foreign Service and that "the threat of terrorist activity has grown in many areas." However, the undisputed expert witness testimony in the record is that terrorist attacks occur rarely and, when they do occur, they are not aimed at older aged employees more than the younger ones (Barall Aff., para. 11).[10] The

[9] Plaintiff Wells, for example, had to be flown from Vietnam to Clark Field in the Philippines for surgery at the age of 50 when "My 'trick knee'—from high school athletic days—locked while I was doing the tarantella with the wife of the Italian military attache" (Wells Aff., para. 4).

[10] Indeed, Ambassador Barall, surmised that statistically there is a greater possibility of criminal attack on the streets of Washington for the thousands of civil service employees who work here (and who can continue to work after the age of 60) than there is possibility of terrorist or wartime attack on Foreign Service personnel overseas. Moreover, Ambassador Barall noted that For-

appellants' own record supports this fact for the Service commonly sends its most important officials—its ambassadors (who are not subject to the age 60 retirement provision)—into some of the most dangerous overseas posts after the age of 60. Ellsworth Bunker, for example, served as ambassador to Vietnam at the height of the Vietnam War at the age of 73. State Deparement *Biographic Register* (1974 ed.). The undisputed evidence in the record shows that Foreign Service employees are not policemen, are not even armed, and are not expected to resist or counter terrorist attack of other violence (Barall Aff., para. 11; Wells Aff., para. 6).

The appellants state (Gov. Br. 22-23) that Foreign Service employees must be mobile and accept assignments to different posts. However, the appellees submitted the uncontradicted testimony of experts that older workers working overseas have no more difficult adjusting to changed conditions than younger ones (English Aff., para. 3; Fox Aff., para. 3) and that the psychological stresses of isolation or of establishing a new household in a new setting are ordinarily far greater for Foreign Service employees when they are young or have young children than when they are older and their children are grown (Barall Aff., para. 2).

Amicus AFSA (AFSA Br. 16) repeats the claim made below by appellants that living and working con-

eign Service employees are provided with guarded homes and personal armed guards, if necessary, a protection not ordinarily afforded civil servants in Washington.

ditions are less favorable overseas than in the United States. However, even at the so-called "hardship posts", the evidence in the record shows that the hardship conditions cited in the government's letter to the Civil Service Commission (Gov. Ex. 2)—poor housing, limited variety, poor quality, and unsafe foods, substandard sanitary conditions, etc.—largely existed in the past and, in any event, are largely inapplicable to Foreign Service employees. Thus, while adequate housing and sanitary facilities may be in short supply, and large segments of the local population may live in substandard housing with substandard sanitary facilities, the uncontradicted evidence in the record is that housing and sanitary facilities for Foreign Service employees are never substandard and are frequently superior to that enjoyed by Civil Service employees in the United States (Barall Aff., para. 9; Olsen Aff., para. 6; Van den Berg Aff., para. 5; Wells Aff., paras. 4, 5). For example, appellee, Mary Cardoso, a secretary, and her husband, were provided with a two-bedroom air-conditioned apartment in Zanzibar, complete with two fulltime servants and use of the embassy swimming pool and tennis courts (Cardoso Aff., para. 3). Appellee Olsen's affidavit states that "[t]he housing has been better than what I could have obtained in the United States for the same price" (Olsen Aff., para. 6). And while there may be a limited variety and quality of food available in local markets, the record shows that Foreign Service personnel usually have the use of United States government commissaries as well as the use of airplanes which fly in fresh food from nearby posts (Barall Aff., para. 10).

The most that can be said for the claim that living and working conditions overseas are less favorable than

those in the States is that it is a highly subjective one, and judgments can and do differ with respect to it. Ambassador Barall, for example, pointed out that many of the hardship posts have other amenities not available to the majority of Washington civil servants —for example, low-cost household help, unpolluted beaches and air, private swimming pools and tennis courts paid for by the U.S. government, inexpensive liquor and food, slower pace of life, and high social status in the local community (Barall Aff., para. 9-10).

Finally, appellants claim (Gov. Br. 23) that Foreign Service employees are unique because they devote a substantial part of their careers to overseas duty. We submit that the question of whether or not Foreign Service employees work overseas for greater periods of time than other government employees is irrelevant since the appellants have failed to show a correlation between working overseas and diminished physical and mental capacity to work between the ages of 60 and 70. Nevertheless, in response to the district court's request, the parties submitted evidence that far larger number of Civil Service employees work overseas (58,489) than Foreign Service employees (4,787).[11] These employees work for such diverse agencies as the Department of Defense Teachers Corps, the U.S. Travel Service in the Department of Commerce, the Immigration Service, the Foreign Agricultural Ser-

[11] The figure of 58,489 was provided by appellants to the court below in response to its request (J.S. App. 4A). Appellants now state (Gov. Br. 24, note 26) that a 1977 Civil Service Commission report shows that the figure is actually twice that large and that, when employees in United States Territories are included, the figure is 134,000.

vice, the Federal Aviation Agency and numerous other agencies. These Civil Service employees are not subject to mandatory retirement at age 60.[12] Appellees introduced evidence that an individual Civil Service employee is as likely to spend a significant portion of his career overseas as is a Foreign Service employee. The appellants dispute this fact (Gov. Br. 23-24), but they declined below to submit comparative evidence concerning the amount of time worked overseas by Civil Service employees on the ground that data was not readily available and would be too burdensome to produce (J.S. App. 7A). As the district court noted (J.S. App. 7A) appellees' evidence showed that employees of the Foreign Agricultural Service (who do not have to retire) serve overseas in approximately the same manner and for nearly the same number of years as Foreign Service employees. Appellees also introduced Defense Department publications which showed that civilian employees of the Defense Department's Overseas Dependent Schools program—including librarians, teachers, guidance counsellors, social workers and psychologists—who are not subject to mandatory retirement, and who are required to accept assignments to any overseas posts in the world, are employed through the world and that many have in fact worked continuously abroad for 15 to 28 years (Pl. Response, to Def. Response to Request for Infor-

[12] Many Civil Service blue collar employees who do not work overseas are, however, engaged in arduous occupations—for examples, mine inspection, ammunition, explosive and toxic material work, sandblasting, industrial cleaning, and tunneling. *Civil Service Handbook*, Civil Service Commission (1976). Yet, none of these employees are subject to retirement at age 60.

mation, and exhibits referred to therein, filed June 1, 1977).[13]

We submit that the district court correctly concluded from its analysis of the statistics and other evidence in the record that large numbers of Civil Service employees work overseas in jobs comparable to those of workers in the Foreign Service (J.S. App. 7-10A). However, we further submit that the number of Civil Service employees working overseas is not the dispositive issue in this case. As we have noted, appellants have failed to show any evidence of a correlation between working overseas in the Foreign Service and diminished capacity to work between the ages of 60 and 70. Appellees, on the other hand, have submitted substantial evidence, which was not factually rebutted, that there is no correlation between overseas work and diminished capability to work between the ages of 60 and 70. Consequently, even if the record failed to show that any Civil Service employees worked overseas, the record would still be barren of any evidence that the age 60 retirement provision has a relationship to ensuring competence in the workforce. The fact that large numbers of Civil Service employees do work overseas, that

[13] Appellants are mistaken when they state (Gov. Br. 24) that a Defense Department regulation limits the overseas tenure of Defense Department employees to a term of five years. The regulation cited does not apply to all Defense Department employees. The 7,500 employees of the Defense Department's Overseas Dependent Schools program, for example, are not subject to the regulation as appellees' Exhibits 7-10 indicate. In addition, even those civilian employees who are limited to five-year tours are allowed to return overseas for subsequent five-year tours after serving intervening tours in the United States.

many of them work in hardship posts, and for periods of time comparable to periods served by Foreign Service employees, and work between the ages of 60 and 70, and above 70, is merely additional evidence that the age 60 retirement provision lacks a rational basis.

B. The Record in This Case Concerning the Ability of Persons Over Age 60 to Perform Foreign Service Work Overseas Is Adequate

Appellants claim (Gov. Br. 6) that the district court reached its decision in this case on the basis of a record which is "limited". They are in error.

One month after filing their complaint, appellees served an initial set of interrogatories on appellant government agencies (Docket Item No. 3). Although appellants initially resisted answering, these interrogatories were ultimately answered 7 months later. Appellees then attempted to serve additional interrogatories, to take depositions, and to present testimony of witnesses for the purpose of supporting their contention that there was no rational basis for the age 60 retirement provision. The government agencies opposed the answering of further interrogatories (Docket Item No. 25) or the taking of depositions, and insisted that the case could be decided by the district court on the basis of the government's motion for summary judgment (Tr. 4).

Subsequent to a hearing on the government's motion, the district court issued an order on December 3, 1976 (Docket Item 34), stating that the record relating to the rationality of the classification challenged appeared to be incomplete, particularly with respect to the factors underlying its congressional enactment. The parties were requested to supplement the record with additional affidavits which was done on February 1, 1977. Subsequently, the district court requested additional factual information which was furnished by the parties (Docket Nos. 43, 47-49).

Appellees contended throughout the proceeding below that, if they were given the opportunity to proceed with additional interrogatories, the taking of depositions, and the introduction of witness testimony, they would be able to introduce further evidence that overseas work does not diminish the ability of Foreign Service personnel to perform their various jobs. For example, appellees stated that they wished to obtain statistical date from the medical division of the defending agencies in order to support their contention (already supported in affidavits) that proportionately more Foreign Service employees under the age of 50 are medically disqualified from serving at hardship posts than are employees over the age of 50, and that proportionally more employees under the age of 50 are given medical discharges for psychological and psychiatric health problems than are employees over the age of 50 (Memorandum in Support of Motion for Order Permitting Plaintiffs to Engage in Discovery, filed February 1, 1977, pp. 2-3).[14] Appellants contended throughout the proceeding that the case should be de-

---

[14] The appellants declined to furnish statistical information from their medical records which was requested by appellees in the first set of interrogatories on the ground that it would be burdensome to comply (Ans. to Int. 18). They declined to furnish the names of doctors on their medical staff, which were requested by appellees in the second set of interrogatories, on the ground that the information would not be relevant to the suit (Def. Obj. to Int. Docket No. 25).

cided on the basis of the existing record and that the Court should grant their motion for summary judgment.

During oral argument, the Court asked appellants' counsel if the appellants would want to submit additional factual evidence if the court treated the case as one which involved mixed questions of fact and law and not merely of law as appellants claimed. Appellants' counsel stated that they would not (Tr. 44).

Although the district court expressly invited the parties, even after oral argument, to submit additional factual evidence to support their contentions, "particularly as to the factors underlying congressional enactment" (Order of Dec. 3, 1976) appellants submitted only the conclusory affidavit of their own personnel director that in his opinion some of the statements made in the government's Exhibit No. 2, described above, were correct.

Appellees contended after oral argument, in their Memorandum of Feb. 1, 1977, referred to above, that, given the slim factual showing by appellants to support their claim, and the extensive factual evidence introduced by appellees to rebut it, the district court had before it sufficient evidence to demonstrate that there was no rational purpose for the retirement provision (Memorandum in Support of Motion for Order Permitting Plaintiffs to Engage in Discovery, *supra,* pp. 3-4). Appellees stated that, if the court agreed with this view, they would waive their right to further discovery and would consent to the court treating the case as if submitted on cross-motions for summary judgment. *Id.* Appellees insisted, however, that if the court did not agree that there was sufficient evidence

to find for appellees, they wanted, and were entitled to, the opportunity to proceed with discovery and the opportunity to introduce additional evidence. *Id.* at 4.[15]

The three-judge court subsequently considered the Department's claim that a lowered retirement age was related to assuring competence because of overseas conditions on the basis of the legislative history and the factual record submitted by the parties. Contrary to appellants' complaint in this appeal (Gov. Br. 6) that the district court decided the case on the basis of "a limited record", the record as to this claim was limited only to the extent that appellants chose to do so. Appellees submitted extensive evidence. They would have introduced even more had not appellants refused to answer appellees' second set of interrogatories, opposed the taking of depositions or presentation of witness testimony, and moved for summary judgment on the basis of the existing record. Appellants cannot now justifiably complain that the record was "limited" and that the court below committed reversible error in ruling upon it.

---

[15] Appellants are correct (Gov. Br. 5, note 6) that appellees did not formally move for summary judgment at the time of the oral argument on the government's motion for summary judgment. The court's opinion below is in factual, although not material, error on this point. The court's opinion states that "plaintiffs moved for summary judgment at oral argument" (J.S. App. 2A). The word "at" should read "after."

The court's order of Dec. 3, 1976, which ordered the parties to supplement the record, stated that the court reserved the right to treat the matter as if submitted on cross-motions for summary judgment. It was in response to this order that appellees submitted additional factual evidence and filed the memorandum of February 1, 1977, discussed above in the text.

C. The Conclusory Statements in Legislative Materials Do Not Provide a Rational Factual Basis for the Retirement Provision

Appellants contend (Gov. Br. 8-9) that legislative materials show that Section 632 of the Foreign Service Act of 1946 was enacted by Congress because of the uniquely demanding nature of Foreign Service work. In fact, the history of the various statutes cited does not support this contention.

The 1946 Act was a major reorganization of the State Department's personnel system designed to maintain it as an elite career Foreign Service in which university-educated young men would enter on the basis of competitive examination and would be advanced by merit to the top officer ranks. Although the Act has been amended in minor respects from time to time, it has provided the basic framework for the Foreign Service career officer system to this day.

Section 632, the mandatory retirement provision, is only one relatively small section of the Act which consists of 197 provisions and consumes 158 printed pages in the United States Code.

It is undisputed between the parties that there is no statement in the 1946 Act, or in the reports and debates relating to the Act, that Section 632 was enacted because post-60 year olds were not able to perform the work of the Foreign Service.[16] Appellants argue (Gov.

[16] The House Report on the 1946 Act, H.R. Rep. No. 2508, 79th Cong., 2d Sess. (1946) states: "In general the retirement age is lowered from 65 to 60."

A reference to the fact that selection out was not to be extended to Class 1 Officers because mandatory retirement would achieve the desired turnover in that class was the only other reference to

Br. 13-15) that it does not matter that there was no reference to this issue in the 1946 legislation establishing an age 60 retirement requirement because the 1924 Rogers Act had provided for an age 65 retirement. We submit that appellants' reliance on the 1924 Rogers Act is misplaced.

The purpose of the Rogers Act was two-fold: to merge the Diplomatic and Consular positions in the State Department into a combined Foreign Service, and to improve the salaries and other working conditions of officers holding those positions in order to recruit able persons on the basis of merit rather than on the basis of personal wealth. As the Act's author, Congressman Rogers, stated: "This bill, for the first time in the history of the United States, will make the [Diplomatic] Service available to the poor man." 65 Cong. Rec. 7564 (1924).

An important feature of the Act was the establishment for the first time of a retirement system for employees in the Consular and Diplomatic Services. Until the Rogers Act, such employees received no pension or other compensation upon retirement. They also were not required to retire at any age. The portion of the congressional debate on the Rogers Act quoted by appellants (Gov. Br. 14) omits the preceding paragraph in which Congressman Rogers discussed the age 65 mandatory retirement provision and explained that its purpose was to entitle Service employees to retire and to receive a pension upon retirement.

> Mr. Rogers. There never has been a retirement system for the Foreign Service. We retire our

the mandatory retirement provision in the report (*Id.* at 91). This reference will be discussed in greater detail in Part III of this Argument.

Army officials and our Navy officials. We retire our judges. We retire all these three services without exacting any contributions from the beneficiaries. We retire the civil-service employees of the Government, but we exact 2½% from these men out of their salary. In this bill we say that the principle of retirement is so firmly established in this country in almost every other Government activity that there seems no reason why we should not extend it to this additional realm of Government activity.

We say this—and in my judgment it is too niggardly, but we wanted to present a bill that would certainly meet with the approval of the House—we say to the Foreign Service men, "You must contribute 5 percent of your salary." I think the analogy of the Foreign Service officer to the Army officer and to the naval officer is much more complete than to the civil-service employee in Washington.

The Foreign Service officer is going hither and yon about the world, giving up fixed places of abode, often rendering difficult and hazardous service of prime importance to the United States. Yet we say that we will not treat him as we do Army and Navy, which are upon a noncontributory basis. We will not do for them what Great Britain does, by retiring her Foreign Service men on two-thirds pay without exacting contributions. We will not even do for them what we do for the civil-service employees of the Government in requiring them to pay but 2½%. What we do for the Foreign Service officials is to take 5% of their salary; but on the other hand—and I think you will agree that we could not do less—we remove the artificial provision which provides a maximum annuity of $720.

MR. CELLER. You make the retiring age 65 years?

MR. ROGERS. Sixty-five.

MR. CELLER. And the clerk in Washington in the field service is retired at 70 years of age?

MR. ROGERS. * * * There is added a provision that the Secretary of State may retain any man for five years if he finds it wise for the country to retain him.

I call to the attention of the gentleman the fact that the kind of service which these men must render involves going to the Tropics; it involves very difficult and unsettling changes in the mode of life. The consensus of opinion was that the country was better off to retire them, as a general rule, at 65. (Applause.)

This exchange with Congressman Celler was the only reference in the debate to the age of retirement other than the debate on the amendment to raise it to age 70 referred to by appellants (Gov. Br. 15, n. 15)."[17] The focus of the debate was the need for better salaries, representational allowances, and a retirement system, in order to attract qualified persons of modest means into the Service. Similarly, Congressman Rogers' remarks quoted above show that the primary purpose of the 1924 retirement provision was to establish a fair retirement system under which Diplomatic and Consular Service officers could retire and receive pensions and that it was only incidentally concerned with the age at which officers would be entitled to retire. Moreover, since there was no voluntary retirement provision in effect at the time or provided for in the Rogers Act, the exchange, while it is not without ambiguity, appears to show Congress' belief that State Department personnel working overseas deserved the advantage of retiring at

[17] The amendment to raise the age to 70, and the debate thereon (65 Cong. Rec. 7586), was concerned exclusively with whether the cost of the retirement fund would be too high if Foreign Service employees were permitted to retire voluntarily and receive a pension at age 65.

age 65 rather than age 70 (the Civil Service retirement age) because of the difficult and nomadic life that was required of them, and in order to give them the economic means to return and establish themselves in their homeland.

However, even if Congressman Rogers' remark that "the country was better off to retire them, as a general rule, at 65" is taken as meaning that persons over this age are no longer qualified to carry out the duties of the Foreign Service, this hardly demonstrates a rational basis for the mandatory age 65 retirement provision in the Rogers Act. The legislative history of the Act contains no information supporting any such conclusion and appellants have submitted no evidence on this point.

In any event, even if it is assumed, *arguendo,* that there was a factual basis justifying a mandatory retirement age of 65 in 1924, there was no such evidence justifying a mandatory age of 60 in 1946. Even if we assume that the quoted exchange between Congressmen Celler and Rogers reflects a belief on the part of the 1924 Congress concerning the competence of post 65 year old Consular and Diplomatic Service officers working overseas, it should be recalled that appointments and promotions of persons in the Service prior to that time had generally been made on a political basis without regard to qualifications.[18] In addition, the absence

[18] The spoils system of appointing and promoting diplomatic officers existed until after World War I. Diplomatic officers served for little or no pay and tended to have short tenures. Consular officers were salaried. These and other facts concerning the historical origins of the Foreign Service are set forth in Stein, *The Foreign Service Act of 1946* (Committee on Public Administration Cases—1949); Jones, *The Evolution of Personnel Systems for U.S.*

of any retirement system for salaried consular officers prior to 1924 tended to prolong their tenure and it can be assumed that this included officers who were no longer physically or mentally able to perform the work required (if indeed they had ever been equipped to do so). Finally, neither before 1924 nor after it, was there selection out for poor performance, for medical reasons, or any other system to weed out those in the Services whose energies had declined with advancing age. Thus, any assumption that the retirement age was set at 65 in 1924 as a means of ridding the Department of incompetent employees would not be relevant to ascertaining the legislative purpose in 1946 when the Congress established a Foreign Service system of appointing and promoting on the basis of merit, and of selecting out on an annual basis those who were not able to carry out their responsibilities adequately.

Moreover, it should be recalled that, in 1924, the general conditions of society were such that a retirement age of 65 would have been viewed as bearing a rational relationship to the abilities of individuals generally to continue working. The average life expectancy in 1924 was only 58 (Division of Vital Statistics, U.S. Public Health Service). Moreover, overseas work in the Diplomatic and Consular Services—particularly in the tropics referred to by Congressman Rogers—had to be carried on without modern-day luxuries. By 1946, the average life expectancy had risen to 64 and overseas work in the Foreign Service involved far more amenities.

Foreign Affairs, A History of Reform Efforts (Carnegie Endowment for International Peace 1965).

Thus, the legislative history of the mandatory retirement age of 65 adopted in the Rogers Act in 1924, even if it were far stronger than it is, could not possibly support the mandatory retirement age of 60 included in the Foreign Service Act of 1946.

As the evidence concerning modern day working conditions in the Foreign Service summarized above shows, this lack of any rational relationship between a mandatory retirement age of 60 and the need for a competent Foreign Service is even more clear today than it was in 1946. As Mr. Justice Stone wrote for this Court in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 (1938): "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing * * * those facts have ceased to exist." The average life expectancy, as of 1976, is 72.8. As the evidence in this record concerning overseas conditions shows, Foreign Service employees today—in the tropics and elsewhere—have air-conditioned offices, cars and government-supplied housing, government-furnished airplane transportation, government furnished inoculations against those contagious diseases which are still prevalent, and government-furnished medical facilities for any illness which does occur. Thus, as life expectancy has substantially increased and overseas conditions have steadily improved, the retirement age in the Foreign Service has been lowered from no retirement age at all (prior to 1924) to age 65 (the Rogers Act) to age 60 (the 1946 Act) without any justification for doing so.

Defendants rely (Gov. Br. 18-19) on the legislative history of statutes transferring categories of civil service employees to the Foreign Service retirement system

subsequent to the 1946 Act as providing the basis for the 1946 retirement provision.[19] The legislative history cited by appellants shows that Congress was concerned primarily with the merits of transferring the category of civil service employees into the Foreign Service retirement system (rather than with the issue of retirement age). The issue before the Congress in each instance was whether the employees should be transferred to the Foreign Service and Disability Retirement System for purposes of pay, promotion, rank, and retirement, or continued under the Civil Service system.

Congress accepted the State Department's recommendation that the new employees be placed as nearly as possible on par with existing Foreign Service employees and made subject to comparable pay, promotion and retirement provisions. H. Rep. No. 2104, 86 Cong., 2d Sess. (1960); 106 Cong. Rec. 17071 (1960) (remarks of Rep. Hays); Hearings on Amendments to the Foreign Service Act before the Subcommittee on

---

[19] The original concept of the Foreign Service as an elite group of well educated officers who would be chosen to start at the lower ranks on the basis of competitive examinations and interviews and be promoted on the basis of merit to perform highly specialized diplomatic tasks, has been significantly changed over the years as employees have been added to the Foreign Service through routes other than that of the Foreign Service competitive examination. For example, from 1954 to 1956, large numbers of career civil service employees in the State Department were transferred by lateral entry into the Foreign Service. These employees increased the numbers in the Foreign Service threefold. Jones, *supra*, at 82. In 1968, United States Information Agency civil service employees (82 Stat. 812) and in 1973 AID personnel (87 Stat. 722) were brought into the Foreign Service. The Foreign Service was also expanded in 1960 and again in 1976 to include Civil Service staff employees such as secretaries, librarians and language teachers. 74 Stat. 535; 90 Stat. 834.

State Department Organization and Foreign Operations of the House Foreign Affairs Committee, 86th Cong., 2d Sess. 155, 158 (1960); 113 Cong. Rec. 32184-32185 (1967) (remarks of Sen. Ellender); H. Rep. No. 1632, 90th Cong., 2d Sess., 3 U.S. Cong. & Admin. News 3477 (1968).[20] Neither House voted on the appropriateness of the retirement age during consideration of any of these measures. Nor is there any indication in the legislative history that Congress considered any evidence on the issue of whether Foreign Service employees were competent to carry out their responsibilities past age 60. In sum, these post-1946 statutes provide no additional support for the 1946 Act.

In addition to reliance on the legislative statements made in connection with the 1924 Rogers Act and in connection with the legislation transferring categories of employees to the Foreign Service System, appellants suggest (Gov. Br. 16-17, 18) that there have been independent studies concerning hardship conditions over-

[20] The legislative statements cited by appellants (Gov. Br. 19) relating to incorporation of additional groups of Civil Service employees have to be read in context. For example, the complete statement in the 1973 report on incorporation of AID employees into the Service cited by appellants is "[t]he Foreign Service system provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service. It has several advantages over the Civil Service provisions: (1) Foreign Service personnel may retire at age 50 with 20 years of service * * * while Civil Service personnel may retire at age 55 with 30 years of service. * * *." The import of this statement is that because of the requirement that they work overseas, employees in the Foreign Service, including the newly incorporated category of AID employees, deserve the benefit of voluntary early retirement with a pension. It did not state that, because of the difficulties of overseas service, competence to perform diminishes with age.

seas and their relationship to the mandatory age 60 retirement provision. In fact, these studies made no examination of overseas conditions and their relationship to performance or even considered that issue. The focus of the 1954 study cited (Gov. Br. 16-17) was the comparative costs to the government of having separate retirement systems rather than one unified system with comparable pensions and other benefits. As appellants noted (Gov. Br. 16), the 1954 study was to determine "the necessity for special retirement provisions for selected employee groups, including overseas personnel." Contrary to appellants, the Committee did not provide a "more detailed description of the unusual factors that had prompted Congress to confer preferential retirement treatment on Foreign Service employees" (Gov. Br. 17). As the Committee report itself makes clear, the lengthy quotation on page 17 of the governent's brief, which is attributed to the Committee, was actually submitted to the Committee by a Foreign Service retired employee organization in support of its view that a separate Foreign Service retirement system was justified. In fact, the Committee's own conclusion, submitted to Congress was (S. Doc. No. 89, 83rd Cong., 2d Sess. 22 (1954)):

> While the Committee is inclined to the view that all employees assigned overseas serving under similar conditions should be treated equitably for retirement purposes, it refrains from making any specific recommendations in this area. The subject of overseas employment in all its aspects is, we understand, under consideration by the President's adviser on personnel management * * *.[21]

[21] The Committee's report also included a section summarizing all the provisions of the Foreign Service Retirement system, including those relating to voluntary retirement at age 50, and then

Similarly, the 1966 study, which was referred to by the appellants (Gov. Br. 19) and prepared by the Secretary of State and other Cabinet members, was concerned primarily in the Foreign Service section of the report with whether newly incorporated employees, such as USIA and Foreign Service staff employees, should be placed under the Foreign Service pay and retirement system or should remain under the Civil Service system. While the report contains the conclusory sentence quoted by the appellants (Gov. Br. 19) in the part of the report entitled "Summary Description of the System," this statement is not supported by any evidence. Moreover, the part of the report which contains the Committee's findings and recommendations neither discusses the basis for the mandatory retirement provision nor makes any conclusion about it.

Finally, appellants claim (Gov. Br. 20-21) that Congress recently reaffirmed that Foreign Service employees should be retired at age 60 because of the "unique requirements of the Foreign Service" when it excluded Foreign Service employees from the Age Discrimination in Employment Act (ADEA) Amendments of 1978, Pub. L. 95-256, which eliminated mandatory age retirement for all Civil Service employees. However, this contention is totally inconsistent with the

---

contained the explanation set forth in the government's Brief (p. 17) that "These provisions were enacted in recognition of the needs of a career service and of the disadvantages of employment abroad." This statement was not focused primarily on the mandatory retirement provision and was not a conclusion of the Committee that mandatory retirement was based on diminishing competence due to overseas conditions.

legislative history of the ADEA Amendments. Its bipartisan sponsors agreed to an amendment by Congresswoman Spellman to delete the Foreign Service and other employees covered by separate retirement systems from the ADEA amendment at the request of the House Foreign Affairs and Post Office and Civil Service Committees as a matter of jurisdictional courtesy to allow those committees to review the potential impact of the amendments on the separate retirement systems covering those employees. Following Congresswoman Spellman's introduction of her amendment, Congressman Pepper, co-author of the ADEA amendments, spoke in favor of it and explained that he was doing so in accordance with the agreement reached with the other committees. He then went on to state (123 Cong. Rec. H9969):

* * *

> For the record I should state what might appear to be obvious; That we in the House in debating and passing this amendment are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement.

Similarly, Congressman Hawkins, the floor manager for the ADEA amendments, supported the Spellman amendment "to expedite consideration of this bill" and stated (*Id.*).

> By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes.

There was no discussion whatever of any "unique requirements of the Foreign Service" which might

justify a lowered retirement age. As the above debate shows, the sponsors of the measure expressly disavowed any intention to make a judgment on that issue. Appellants' reliance on the recently passed ADEA amendments therefore is wholly misplaced.

Apart from the fact that the legislative statements cited by defendants are largely inapposite, the most striking and significant fact about them is their conclusory nature. In not one single instance is there any reference to statistics, objective studies, medical records, or any other underlying data to support a conclusion that overseas work diminishes the competence of older Foreign Service employees.

This failure to base an earlier-than-normal mandatory retirement classification on underlying evidence is in marked contrast to action taken by it in establishing other such mandatory retirement statutes. For example, Congress has relied upon detailed scientific and empirical studies in establishing lower retirement ages for workers in jobs involving public safety. Thus, before establishing a mandatory retirement age of 56 for air traffic controllers, it relied upon studies by the Department of Transportation which examined all available data concerning the relationships between stress, age, and occupation, and tested the physiological impact of stress on air traffic controllers. H.R. Rep. No. 615, 92nd Cong., 1st Sess. 5-15 (1971).

Similarly, as the Second Circuit noted in *Airline Pilots Assn.* v. *Quesada,* 276 F.2d 892, 898 (1960), the Federal Aviation Agency undertook an empirical study before it enacted a regulation requiring airline pilots to retire at age 60. The agency based its decision on medical evidence in the record that sudden incapacitation due to heart attacks or strokes becomes more frequent as men approach age 60 and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks. Because of this, the Second Circuit held that the age 60 limit had a rational relationship to the FAA's job of protecting the public from air accidents.[22]

In contrast, here, the legislative history of the relevant statutes provides no support for an earlier retirement age. Coupled with the lack of evidence in the record to support retirement at age 60, this demonstrates that this requirement is not supported by an adequate factual basis for concluding that it is rationally related to a legitimate governmental objective.

D. The District Court Properly Applied the Rational Basis Standard of Review Formulated by This Court to the Factual Record Before It

As we have seen, in claiming that mandatory requirement at age 60 is required because of the severe burdens of overseas service, appellants have placed almost total reliance on inapposite and conclusory legislative

---

[22] The record in *Murgia* also showed that the State of Massachusetts carefully reviewed its various retirement statutes affecting differing categories of state employees on a periodic basis and appointed study commissions to examine the underlying bases for differing retirement ages before enacting or amending the statutes, (427 U.S. 313, note 7). As this Court noted (at 315, note 9), the periodic fine-tuning of the state's maximum age limitations by state legislative commissions proceeded on the principle that "maximum retirement age for any group of employees should be that age at which the efficiency of a large majority of the employees in the group is such that it is in the public interest that they retire." This is in direct contrast to the situation in the present case where no leigslative study of underlying facts has ever taken place, and no evidence submitted that 60 is the age at which the efficiency of a majority of Foreign Service employees declines to the point that it is in the public interest that they no longer work.

statements. The Department's argument seems to be that the existence of such statements is the end of judicial inquiry. They contend that the constitutional issue of rationality is a question of law (Gov. Br. 5) and that legislative conclusions should not be overturned on judicial review because a court disagrees with them (Gov. Br. 25).

We submit that, even under a minimum rational basis standard of review, a challenged legislative classification, while entitled to a presumption of validity, is not rational as a matter of law solely because the legislature has advanced a reason for enacting it. The rational basis standard of review requires judicial examination of whether the stated reason for the legislation bears a fair and substantial relationship to a proper legislative objective. *Reed* v. *Reed,* 404 U.S. 71 (1971); *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *Trimble* v. *Gordon,* 430 U.S. 762 (1977); *Gault* v. *Garrison,* 569 F.2d 993 (7th Cir. 1977), *petition for cert. filed,* 47 U.S.L.W. 3059 (U.S. April 1978) (No. 77-1517). These recent decisions make clear that, under the minimum rational basis standard of review, courts must look beyond any superficially proffered justification to see whether the stated governmental goal is legitimate, whether the classification at issue bears a rational relationship to that goal, whether the nexus is substantial or tenuous, and whether the means used to achieve the goal, i.e., the classification itself, is fair and not arbitrary or based on an overboard generalization having no basis in fact.

The government's approach would make a mockery of judicial review of legislation challenged as irrational. As this Court noted in *Trimble* v. *Gordon, supra,*

in applying a minimum rational basis standard of review, "the scrutiny of the court is not a toothless one" (at 767) and "the Equal Protection Clause requires more than the mere incantation of a proper state purpose" (at 769). A *fortiori,* a classification is not immune from judicial review when the legislature has stated the reason in broad conclusory terms unrelated to any underlying facts or, as in this case, has not even advanced a reason for enacting it.

Thus, in the seminal case of *Reed* v. *Reed, supra* (at 75-76), Chief Justice Burger, speaking for a unanimous court, enunciated what has come to be the prevailing standard of equal protection review in cases not involving suspect categories such as race.[23] The Court quoted with approval from *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920) that:

> The Equal Protection clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

---

[23] Legal commentators have suggested in recent years that where a classification is based on a stigmatizing characteristic such as age, or restricts an important right, such as the right to work, the standard of review, though it would be less than in cases involving suspect categories or fundamental rights, should nonetheless require a closer scrutiny than in classification cases where such factors are not present. See, *e.g.*, Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection", 86 *Harv. L. Rev.* 1 (1972); Tribe, *American Constitutional Law,* Foundation Press (1978). If such a "heightened" standard of review were to be articulated by this Court, then we submit that this case is a particularly appropriate one to be subject to that standard.

As we have seen in *Murgia,* this Court examined the evidence in support of the state's claim that a lower retirement age for uniformed policemen bore a rational and substantial relationship to assuring public safety. The court found that the underlying factual evidence did support the government's claim and therefore upheld the validity of the statute.

However, a contrary result was reached by this Court in *Craig* v. *Boren,* 429 U.S. 190 (1976). In that case, this Court considered a state statute prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18. This Court acknowledged the legitimacy of the proffered justification that the purpose of the statute was to enhance traffic safety and also the nexus between prohibiting beer to one class of drivers and reducing automobile accidents. Nonetheless, after examining the statistical and other evidence submitted by the state as support for the nexus, the Court found that the evidence was too tenuous and therefore the classification did not bear a "fair and substantial" relationship to the state goal (*id.* at 200, 201):

> However, appellees' statistics in our view cannot support the conclusion that the gender based distinction *closely serves* to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge. (Emphasis added).
>
> * * *
>
> . . . [T]he statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit".

Mr. Justice Powell, in his concurring opinion, similarly commented (*id.* at 211):

> I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a "fair and substantial relation" to this objective.
>
> * * *
>
> It seems to me that the statistics offered by [the state] . . . do tend generally to support the view that young men drive more, possibly are inclined to drink more, and—for various reasons—are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

Similarly, the case at hand is a "relatively easy case." No one questions the legitimacy or importance of the asserted governmental objective: the assurance of a vigorous and intellectually capable workforce. However, the state has totally failed to show that the classification at issue—the forced retirement of employees at the age of 60—bears a fair and substantial relationship to that objective because of the uniquely demanding nature of Foreign Service work overseas. Here, the government has not even attempted to submit any statistics or other objective evidence to support its claim that overseas work diminishes the competence of its older workers. The legislative materials consist, at

the very most, of the most general conclusions. In *Craig* v. *Boren,* the state at least submitted statistics to support its contention. Nonetheless, this Court found that they were too "tenuous" to sustain a finding of rationality. In that circumstance, Mr. Justice Stewart stated in his concurring opinion (429 U.S. at 215):

> The disparity created by these Oklahoma statutes amounts to total irrationality. * * * the disparate statutory treatment * * * without even a colorably valid justification or explanation, thus amounts to invidious discrimination.

We submit that the reasoning of this Court in *Craig* v. *Boren* is therefore *a fortiori* controlling here.[24]

---

[24] Two recent court of appeals' decisions have applied the principles discussed above in mandatory retirement cases. In *Gault* v. *Garrison,* 569 F.2d 993 (1977), *petition for cert. filed* 47 U.S.L.W. 3059 (U.S. April 1978) (No. 77-1517), the Court of Appeals for the Seventh Circuit reversed a district court order dismissing a claim that Illinois law mandating retirement of school teachers at the age of 60 violated the equal protection clause. The court noted that this Court's decision in *Murgia* was controlling, that the decision in *Murgia* was based upon an evidentiary record showing the State's purpose and how the challenged legislation related to that purpose, and concluded that since there was no evidentiary record presented in the case before it, it could not uphold the age 65 classification as constitutionally valid. *Id.* at 996. The court noted that, without a record, even if it assumed *arguendo* that the purpose of the law was to remove unfit teachers, "Unlike the court in *Murgia,* we cannot say that the provisions in the instant case would eliminate any more unfit teachers * * * than a provision to fire all teachers whose hair turns gray." *Id.*

In *Houghton* v. *McDonnell Douglas Aircraft Corp.,* 553 F.2d 651 (9th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3357 (U.S. Nov. 28, 1977), the aircraft corporation claimed that mandatory retirement of its test pilots at age 52 was not a violation of the ADEA because the age limit was a bona fide occupational qualification for the job and therefore was exempted under the Act. In unanimously rejecting the corporation's claim, the Court of Appeals for the Eighth Circuit (comprised of retired Supreme Court Justice Clark and Judges Heaney and Webster) analyzed the statistical and other evidence underlying the corporation's claim and concluded that it was insufficient to support an inference of diminished ability among test pilots at age 52 to perform their work adequately. The court also noted that statistical studies showed that the accident rate of professional pilots decreases with age, that less than one percent of all aircraft accidents are traceable to medical disability, and of this one percent, the most frequent is gastroenteritis which bears no relationship to age. While the case arose under the ADEA, rather than the Constitution, its discussion exemplifies the kind of analysis which is appropriate in considering mandatory retirement statutes.

Appellees agree with Amicus AFSA (AFSA Br. 8) that mandatory retirement statutes which are permissible, like other classification statutes, do not have to be drawn with mathematical precision. *Murgia, supra,* 427 U.S. at 314, citing *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). We submit, however, that they must be within a range that is fairly drawn. As Judge Aldrich stated in the three-judge district court opinion in *Murgia,* 376 F. Supp. 753, 755 (D.C. Mass. 1974):

> But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other.

This Court's reversal of Murgia on the merits, and conclusion that the retirement age at issue was within a fair range, was not inconsistent with Judge Aldrich's statement of the applicable law.

Appellees submit that a retirement age of 60 for Foreign Service employees is outside the range of ages

where there is any evidence of a fair correlation between those ages and competence to perform the work of the Service. Indeed, the undisputed evidence is to the contrary. This evidence includes, *inter alia,* federal government studies showing no dimunition of abilities of white collar federal workers generally to perform their work between ages 60 and 70 and, indeed, showing that in many respects (judgment and dependability, for examples) the performance of workers in that age group is superior.[25] As we have seen, the present record also includes uncontradicted statements that older workers employed overseas by government and private industry and working under hardship conditions, and Foreign Service workers in particular, are at least as able, and in many respects better able, to be assigned to foreign posts and to perform the work there than younger employees with young families.

There is also the undisputed testimony of appellees' medical witnesses that overseas work does not diminish the ability of older Foreign Service employees to perform their work any more than younger employees because of climatic conditions and that medical disabilities occur to Foreign Service employees stationed overseas, and their dependents, at all ages. The statistical evidence in the record, based on information furnished by the appellants, shows that older Foreign Service employees between the ages of 55 and 60 serve in hardship posts in approximately the same proportion as do younger employees.

The growing trend in government, and in private industry, is to permit white collar workers to continue working at least until age 70. Indeed, with the recent

[25] Some of these studies are described in Argument III below.

amendments to the Age Discrimination in Employment Act, Foreign Service employees are likely to be the only white collar Americans, including those working overseas, required to retire as early as age 60 if appellants prevail in this appeal.[26]

In Murgia, this Court, in upholding the retirement law affecting uniformed policemen, noted (at 315-316):

> There is no indication that [the retirement provision] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.

We submit that in this case, unlike the circumstances presented in Murgia, the record described above shows that the age 60 retirement provision has the effect of excluding from Foreign Service work so few officers

[26] The Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 95th Cong., 2nd Sess., (Sec. 3(a) amending 29 U.S.C. 631 and 633(a) and Sec. 5 amending 5 U.S.C. 8335 and repealing 5 U.S.C. 3322), raises the upper age limit for the prohibition of age discrimination from 65 to 70. Under the amendments, mandatory retirement at any age in the federal government, and below 70 for workers in state and local government, and in private industry, is permitted only if age is a bona fide occuational qualification for a particular job. Tenured university teachers can be mandatorily retired at age 65 until 1982 and certain high paid executives are also exempted after age 65.

Armed Forces personnel, like law enforcement personnel, are not covered by the ADEA amendments. They continue to be subject to lowered retirement ages, which, presumably, under this Court's decision in *Murgia,* is constitutionally permissible. However, even in the federal defense establishment, only the uniformed forces are subject to lowered retirement ages. Under the ADEA white collar civilian employees in the Defense Department and in the various military branches may not be mandatorily retired at any age. H. Rep. No. 95-527, 95th Cong., 1st Sess. 111 (1977).

who are in fact unqualified as to render the provision wholly unrelated to the object of the statute to maintain a competent workforce.

In sum, the district court below was entirely correct in stating that the rational basis standard of review "does not require judicial abdication" even though it does mean that the legislatively drawn distinction is "presumed valid" and that "its challengers have a heavy burden in proving its invalidity" (J.S. App. 3A.) The three judge court below further proceeded properly and in accordance with this Court's rulings in subjecting the Department's proffered rationale concerning the uniquely demanding nature of overseas work, including that set forth in legislative statements, to the test of whether the rationale in fact bore a fair and substantial relationship to the stated governmental objective of assuring competence. The court's unanimous conclusion that the proffered justification could "not survive even * * * minimal scrutiny" is amply supported by the record.

III

The Record Does Not Support Appellants' Claim That Mandatory Retirement at Age 60 Is Rationally Related to Assuring Competence Because It Assures More Capable Officers Being Promoted to High Positions, Enhances the Recruitment of Qualified Officers, and Creates Promotional Opportunities for Younger Officers, Thereby Enhancing Incentive and Morale

Appellants' alternative explanation of a rational purpose underlying the mandatory retirement statute (Gov. Br. 8-9, 26-29) is that it (1) assures more capable officers attaining high positions; (2) enhances the recruitment of qualified officers; and (3) creates promotional opportunities for younger officers and thereby enhances officer incentive and morale. No statement in

the legislative reports or debates underlying the 1948 Act that these were in fact the purposes of the retirement provision has been cited.

First, it should be noted that these explanations furnished by appellants are, on their face, inapplicable to non-officer staff employees and thus can provide no rational basis for their mandatory retirement at age 60.

Secondly, as we will see, there is no evidence in the record to support these explanations even as to officers. Consequently, the relationship between mandatory retirement and each of these goals—promoting more capable officers to high posts, enhancing recruitment of qualified officers, and enhancing officer incentive and morale—is not a substantial one. Moreover, they are largely based on old, overbroad, notions about the capabilities of persons as they grow older which have no basis in fact. We submit that a mandatory retirement classification for the purpose of promoting young persons which is based on the accuracy of such notions is discrimination *per se*. Even if the purpose of the classification is only to reduce the number of applicants for a limited number of positions, we further submit that the means of achieving the goal is itself arbitrary and therefore in violation of equal protection guarantees.

A. Appellants' Claim That Mandatory Retirement Assures More Capable Officers Attaining High Positions Has No Support In The Record Or Logic

Appellants' claim (Gov. Br. 26) that the mandatory retirement provision creates promotional opportunities for younger officers and thereby assists in the promotion of more capable officers to high positions. They state more specifically (Gov. Br. 27) that the "system

prepares and helps to identify the best officers for service at ambassadorial and other high levels." It is plain that this statement does not provide a rational basis for mandatorily retiring the majority of Foreign Service employees for whom ambassadorial or other high rank is not a realistic goal. Not only are the over 3,000 staff employees unlikely to become ambassadors, but not many officers can expect to achieve that goal either.[27] As we have seen, officers in ICA, AID, and in the State Department carry on a wide variety of functions, including, for example, arranging cultural

---

[27] Senator Pell, floor manager for numerous measures affecting the Foreign Service, stated during hearings on S. 1791 (the Foreign Service Retirement and Disability System) before the Senate Committee on Foreign Relations, 93rd Cong., 1st Sess. 56 (Nov. 28, 1973):

> I have seen many classes of Foreign Service officers come up here and have told each one of them that the chances are that only about a tenth of them will get to be ambassadors and nine-tenths will not. They all seem to blanch and seem to think it very bad form to say that, but it is a fact. I think the Government is at fault leading them to feel that every Foreign Service officer has an ambassador's flag in his brief case, and I am wondering if one of the faults is not with us who recruit these young men * * *. When you go into the clergy, which is a service life, you don't go in to become a bishop; you go in to serve your communities and your faith and your belief.

A report by John Goshko in *The Washington Post*, Jan. 11, 1978, noted that over the last 45 years an average of 35% of the ambassadors have been appointed from outside the career Service. The article further noted that jet travel and instant communications have greatly reduced the autonomy of ambassadors and that now nearly all important policy making decisions emanate from the State Department in Washington. Lars Hydle, president of amicus AFSA, recently testified in Congress that 16 of the 22 top level positions in the State Department are currently filed by persons appointed by the President from outside the career Service. Hearings before the International Operations Subcommittee, House International Relations Committee, 95th Cong., 2nd Sess., Feb. 7, 1978.

exchange programs, providing technical assistance under the AID program, processing visas and other consular work, and supervising personnel offices, as well as serving in the more specialized political and economic cones. A statistical report published in the June 1974 issue of the *Department of State Newsletter* disclosed that during the years 1973 to 1974, 75% to 93% of the promotions to classes 2 and 3 were awarded to State Department officers in the political and economic cones. Officers in the consular and administrative cones during those years received only from 6% to 27% of the promotions to those classes.[28] Most officers outside of the political and economic cones in the State Department are unlikely to be promoted even to class 2, much less to ambassadorial, career minister, assistant secretary or other high policy making positions.

The legislative history of the Foreign Service Act provides no support for appellants' alternative argument that mandatory retirement creates promotional opportunities for younger officers and thereby assures the promotion of better officers to high positions. As we have seen, there was no discussion of the legislative purpose underlying the retirement provision when it was enacted as a minor section of a lengthy and detailed statute reorganizing the Foreign Service in 1946. The only reference in the legislative history of the 1946 Act cited by appellants to support their alternative argument (Gov. Br. 28) is a cryptic comment in the section of the House Report relating to selection

---

[28] The remaining promotions went to officers in positions other than those in the economic, consular, administrative and political cones. See also the State Department's *Status of Women Report*, June 30, 1974.

out for poor performance, H. Rep. No. 2508, 79th Cong., 2d Sess. 91 (1946). That section states that selection out would not be extended to Class 1 officers because mandatory retirement was expected to achieve the desired turnover in that class. This statement indicates that Congress did intend in 1946 that mandatory retirement would be used in lieu of selection out based on performance for Class 1 officers.

The 1946 House Report contains no explanation why Congress considered it desirable to have turnover in the Class 1 ranks. Appellants' view (Gov. Br. 28) is that this shows a general legislative intent to ensure competence by enhancing the promotional opportunities for younger officers. The difficulty with this explanation is that (since there was no reference to any evidence that 60 year olds as a class were less competent than pre-60 year olds) it is wholly inconsistent with the underlying philosophy and purpose of the Act to reform the Foreign Service so as to ensure that all personnel decisions would be made on the basis of merit.[29]

---

[29] The purpose clause of the 1946 Act states (22 U.S.C. 801):

> The Congress declares that the objectives of this chapter are to develop and strengthen the Foreign Service of the United States so as——
>
> • • •
>
> (5) to provide that promotions leading to positions of authority and responsibility shall be on the basis of merit and to insure the selection on an impartial basis of outstanding persons for such positions;
>
> • • •
>
> (7) to provide salaries, allowances and benefits that will permit the Foreign Service to draw its personnel from all walks of American life and to appoint persons to the highest positions in the Service solely on the basis of their demonstrated ability . . . .

In any event, the turnover phrase applied only to Class 1 officers and thus is not an explanation for mandatory retirement of those officers who are not in that class. In addition, since the law was changed in 1955 (69 Stat. 25-26) to allow selection out of Class 1 officers on the basis of performance, this original rationale would no longer be apposite even as to Class 1 officers.[30]

As we have seen, appellants have submitted no evidence of a fair and substantial relationship between advancing younger officers to positions held by officers who reach age 60 and assuring competence in those positions. Appellees, on the other hand, have submitted substantial evidence, which is summarized above, that older Foreign Service officers are at least as well—and frequently better—equipped than younger officers to perform Foreign Service duties. In addition, the appellants' long-standing practice of utilizing post 60-year olds in the most important overseas positions in the diplomatic corps—the ambassadorships—belies their contention that young blood is needed "to main-

---

[30] During the debates on the 1955 measure, Congressman Richards, the floor manager for the bill, stated that the purpose of allowing selection out of Class 1 officers was "to prune the deadwood and allow more capable younger men to move ahead" 101 Cong. Rec. 3557 (March 23, 1975). We submit that this statement does not indicate a legislative judgment that younger men, solely because of their age, would be more capable than older men in Class 1 but was simply a judgment that it should be possible to select out a less capable officer in Class 1 so that a more capable officer could replace him. Such a judgment would be entirely consistent with the stated purpose of the Act to make personnel decisions on the basis of merit. In any event, the purpose of the mandatory retirement provision was not in issue in 1955, and there was no consideration of any evidence justifying it.

tain a high quality diplomatic corps" (Gov. Br. 29).[31]

The credibility of appellants' argument is further seriously weakened by the fact that the Service uses a highly competitive system for entrance into the Foreign Service [32] and a selection out system that annually evaluates the performance of all officers, ranks them in numerical order, designates for potential selection out on the basis of poor performance those who are in the bottom rankings, and, in addition, selects out those officers who have remained in the same class without promotion for a designated period of time.

In addition, officers are subject to biennial medical examinations for physical and psychological impairments to continued service, including service overseas,

[31] From Benjamin Franklin who served as ambassador to France in 1800 at the age of 80 to the more recent appointments of Ellsworth Bunker to Vietnam at the age of 73, David Bruce to China at the age of 80, and Averill Harriman as ambassador at large at the age of 84, the Foreign Service has had a long history of utilizing the talents of persons past their 60th birthday at the highest levels of the Service.

[32] The Foreign Service entrance examination has traditionally consisted of a written examination, including a Foreign language test, a general ability test, and an English expression test, as well as an oral examination. In his statement before Congress this past year, Lars Hydle, president of AFSA, noted that "[t]he Foreign Service has traditionally been able to attract many more applicants than it can accommodate, and to select the best from universities, law and graduate schools throughout the country." Hearings before the International Operations Subcommittee, House International Relations Committee, *supra*. Testimony before the Senate Foreign Relations Committee revealed that approximately 11,000 applicants take the Foreign Service examination each year but that only 100 to 200 are finally admitted into the Service. Hearings on S. 179, Senate Foreign Relations Committee, 93rd Cong., 1st Sess. 69, Nov. 28, 1973.

and those who are unable to serve are involuntarily retired on medical grounds.[33]

The Service also offers the option of voluntary retirement with pension beginning at age 50 for those who themselves do not wish to stay in the Service (22 U.S.C. 1006). Far more officers retire before their 60th birthday than remain in the Service until age 60. The average age of retirement has been age 55. *Department of State Newsletter,* Sept. 1977. As a result of voluntary retirements, resignations before retirement age, deaths, and selections out, the record shows that as of February 28, 1976, only 51 officers and staff employees who were age 59 were on the rolls of the State Department (Pl. Ex. 5). From 1970 to 1975, an average of only 44 officers per year were involuntarily retired under the mandatory retirement provision (Def. Ans. to Int. 2). Those few officers who remain in the Service until age 60 do so because they have been in the upper ranks of their classes, have been regularly promoted because of their competence, have passed the requisite physical and mental health tests, and presumably still retain their enthusiasm for their work since they have chosen not to join the majority of their colleagues and retire voluntarily.

The suggestion of appellants (Gov. Br. 30) that mandatory retirement is needed to get rid of "deadwood" at the upper officer ranks in the Foreign Service is

[33] Non-officer staff employees are also admitted after competitive examination and are subject to separation if unable, because of medical reasons, to serve overseas. Promotion and assignments of staff employees are on the basis of performance reports. 22 U.S.C. 1016. While staff employees are not subject to selection out for failure to be promoted, they are subject to selection out for unsatisfactory performance. 22 U.S.C. 1021.

totally inconsistent with the Department's whole promotion and selection out system. Moreover, it is directly inconsistent with tLe statements of the Service itself. For example, in the Cabinet Committee study on federal retirement systems, which is cited by appellants (Gov. Br. 19), the Committee's recommendation section included the following statement (S. Doc. No. 14, 90th Cong., 1st Sess. 118):

> The Department of State reports that its best officers, because of their capabilities are given the most challenging assignments and generally choose to remain until they reach mandatory retirement age. It is the officers whose careers have leveled out and who are rated in the lower portions of their classes who request retirement before age 60.[34]

The Department's suggestion (Gov. Br. 30, note 31) that mandatory retirement is a more compassionate way of easing out 60-year old officers who have lost their competence then selecting them out on the basis of performance simply is not credible in a system where all officers are annually evaluated and periodically either promoted or selected out. Since the evaluations, promotions, and selections out for non-promotion are made on a comparative basis, rather than

[34] Although the Foreign Service Act gives the Department authority to extend the appointment of officers reaching age 60 for an additional five years, appellants have stated that in fact this provision is sparingly used to allow an officer to wind up an ongoing project and generally lasts for only a few months. They further stated that in the six years between 1972 and 1976, only 2 officers and one information officer were given extended terms (Def. Ans. to Int. 7). Thus, this provision of the Act has not been substantially utilized to retain competent 60 year olds while allowing less competent officers to be mandatorily retired.

according to an absolute standard, officers in the Foreign Service know and expect that only those scoring highest on evaluation reports will be promoted and that those scoring lowest will be selected out. It is extremely unlikely that their sensibilities after age 60 will be more offended at selection out than at a somewhat earlier age. Selection out for a comparatively inferior performance at any age undoubtedly has an adverse psychological impact on the individual adversely affected. Nonetheless, it is as rational to presume that Foreign Service Officers, no less than other people, would prefer to be measured on the basis of their performance and not on the basis of characteristics over which they have no control.[35]

Finally, we submit that unfounded notions about the capabilities of older workers cannot justify a mandatory retirement classification. As a Labor Department official stated: "The essence of age discrimination is the urge to get bright young people. No one perceives of himself as being discriminatory."[36]

[35] A special report of the House Select Committee on Aging, Mandatory Retirement: The Social and Human Costs of Enforced Idleness, 95th Cong., 1st Sess. 35 (August 1977), rejected the claim that mandatory retirement plans saves face for workers who are no longer capable of performing their work:

> . . . Even if competency-based retirement does stigmatize the retired older worker, one must ask, is it fair to shield a handful of workers from stigma by stigmatizing all workers who reach an arbitrary age? A second question is germane: Why, when administrators must every day evaluate the competency of the younger worker, does that task become so onerous when the worker reaches 65?

[36] Statement of Frank McGowan quoted in *Newsweek*, April 29, 1974, p. 42.

We submit that the evidence amply demonstrates that there is no connection between turning 60 and ability to perform work in the Foreign Service. In addition to the evidence in this record specifically applicable to Foreign Service employees, appellees called to the attention of the district court below a number of recent studies on the correlation between aging and the ability to work.

For example, an extensive study by the National Institute of Mental Health found that the intellectual ability of older workers, as measured by the Wechsler Adult Intelligence Scale, was superior to those of the younger groups in terms of verbal skills."[37] In his 1965 Report to Congress, the Secretary of Labor summarized studies of aging and productivity as follows:

> An analysis of the findings of these studies indicates that in factory work, entailing substantial physical effort, productivity decreased slightly in advancing age groups after age 45 and substantially after age 65 but that in office work and in mail sorting, productivity declined little, if any, up to age 60, and only slightly after that. In the study of performance of office workers, the oldest age group, 65 and over, actually had the best record.[38]

---

[37] J. Birren, Human Aging: *A Biological and Behavioral Study* (1971). A memorandum from Dr. Birren was quoted in the ACLU amicus brief (p. 31, note 42) in the *Murgia* case stating: "While certain skills may be influenced by the change in speed with age, they appear very remote from those qualities that would distinguish the experienced professional, the educator, or such activities as the writing of books."

[38] *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965). See also *Research Materials* appended to that report.

Similarly, a study of 6,000 clerical workers which was designed to test the assumption that productivity declines with age, showed that workers in the older age group had a steadier rate of output and that older workers were as accurate in their work as younger persons. Kelleher and Quirk, *Age, Functional Capacity and Work: An Annoted Bibliography,* Industrial Gerontology (Fall 1973). A Civil Service Commission study of women in the federal civil service revealed that older women used less sick leave than younger women. Diane McClelland, "Opening Jobs Doors for Mature Women," *Manpower,* United States Department of Labor, 1975. Although scientific study of the relationships between aging and ability to work has begun only in recent years, the results to date show that the "performance of middle-aged and older persons is at least equal to and often-times noticeably better than younger workers." *Developments in Aging: A Report of the Special Committee on Aging,* United States Senate, 93rd Cong., 1st Sess. 72 (1973).

The House Report accompanying the recent amendments to the Age Discrimination in Employment Act, H. Rep. No. 527 95th Cong., 1st Sess. 4 (1977), noted that:

> Testimony to the committee cited the results of various research findings which indicate that older workers were as good or better than their younger co-workers with regard to dependability, judgment, work quality, work volume, human relations, and absenteeism; and older workers were shown to have fewer accidents on the job. As Congressman Pepper stated before our committee: "The Labor Department's finding that there is more variation in work ability within the same age group than between age groups justifies judging workers on competency, not age."

It is apparent that appellants' thesis that having younger officers at high levels in the Foreign Service assures competence rests upon "archaic and overbroad" generalizations about the capabilities of older employees that are more consistent with stereotyping than with contemporary realities. This constitutes discrimination *per se*. This Court in recent years has invalidated classification schemes adversely affecting women, illegitimate children, and unwed parents which were based on the accuracy of overbroad generalizations. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Trimble* v. *Gordon*, 430 U.S. 762 (1977); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972). *Stanley* v. *Illinois*, 405 U.S. 645 (1972). As this Court stated in *Craig* v. *Boren*, *supra*, 429 U.S. at 198-199, referring to its earlier decision in *Stanton:*

> [I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.

Similarly, we submit that "loose-fitting" characterizations about the abilities of Foreign Service officers after the age of 60 cannot serve to justify a mandatory retirement classification based on the accuracy of those characterizations. Mandatory retirement can be justified only if there is evidence of a substantial relationship between the retirement age and the ability of most persons at that age to perform the particular work as this Court found there was in *Murgia*.

We believe that this Court in Murgia, implicitly but nevertheless clearly, rejected the argument that mandatory retirement is constitutionally permissible because it creates promotional opportunities for young persons.

The single district court judge in *Murgia*, in dismissing plaintiff's complaint as "insubstantial," accepted the State's contention that the Massachusetts statute was rational because it "enhanced the promotional opportunities of younger employees." 345 F. Supp. 1140, 1141 (1972). The three-judge court, on remand from the First Circuit, however, expressly rejected that rationale 376 F.Supp. 753 (1974).

On appeal, this Court did not adopt the reasoning of the single district court judge.[39] Instead of adopting this rationale, which would have simply settled the matter, it carefully analyzed the medical and other evidence concerning the ability of 50-year-olds to perform the strenuous duties of uniformed police work and concluded, on the basis of the record before it, that there was a fair and substantial relationship between the mandatory retirement age and the capability of post-50-year-olds to perform patrollman duties. Consequently, the three judge court in the present case did not commit reversible error when it unanimously concluded (J.S. App. 4A) that "promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme."[40]

---

[39] The State of Massachusetts, which had relied on the rationale in the lower courts, repeated it in its Jurisdictional Statement to this Court (Docket No. 74-1044, J.S. 8) but did not press the matter in its brief.

[40] There is no issue in this case of promoting youth as an affirmative action to remedy past discrimination or to relieve deep-rooted unemployment. Here, we are concernd with an objetive of promoting younger persons solely because they are younger and presumed to be more capable on that account.

B. Appellants' Claim That Mandatory Retirement Enhances The Recruitment of Qualified Officers Has No Support In The Record Or Logic

Appellants claim (Gov. Br. 9) that mandatory retirement provides "attractive career prospects for qualified young persons." There is no evidence—in the record or elsewhere—to support this view. We submit that it is just as logical and reasonable to assume that the Service will have difficulty attracting qualified persons if it has a retirement requirement that threatens to cut short their careers at age 60 over their objections at the same time that advances in health and nutrition continue to extend life expectancy. Early forced retirement has a particularly serious impact on those persons in the Service wishing to continue to work since many Foreign Service personnel have highly specialized skills not easily translatable to other jobs.

Many Foreign Service employees are recruited into the Foreign Service as second careers. For example, Johannes Van den Berg, a plaintiff in this case, was recruited at the age of 47 to supervise Voice of America power stations after 16 years of experience as manager of field services for a large international corporation;

The House Report accompanying the 1978 amendments to the Age Discrimination in Employment Act, H. Rep. No. 527, 95th Cong., 1st Sess. 3 (1977), rejected the argument that mandatory retirement programs are proper because they help create jobs for younger people:

> Our present system . . . of forcing retirees to give their jobs to younger people simply trades one form of unemployment for another. Nor does depriving older and still capable Americans of jobs make any more sense than discriminating in employment against blacks, women, or religious or ethnic minorities.

Plaintiff Richard Olsen had been a foreign language teacher for many years when he joined the USIA at the age of 45. (Van den Berg. Aff., para. 1; Olsen Aff., para. 1). Many persons in the situation of Mr. Van den Berg or Mr. Olsen would have serious questions about making a second career in the Foreign Service if that career is to end at age 60 regardless of competence and desire to continue working."

Retirement can be especially disadvantageous to some women who do not start work until after their children are grown or after being widowed or divorced. Forced retirement limits the number of years of work for these women and reduces their ability to build up significant pension benefits.

It is not speculation to believe that these factors will affect recruitment. Although more and more Americans under age 60 who have the economic means to retire from full-time careers are doing so, recent polls show that the overwhelming majority of the population opposes mandatory retirement.[42] It is therefore likely, in the absence of any empirical evidence to the

---

[41] At the time Van den Berg and Olsen entered the USIA, that agency was subject to the same retirement age of 70 as the rest of the Civil Service since the agency had not yet been brought under the Foreign Service Retirement and Disability System.

[42] The House Report accompanying the recent amendments to the Age Discrimination in Employment Act, *supra*, noted (p. 5) that a public opinion poll conducted by Louis Harris & Associates, Inc. in 1974 found that 86% of the American public agreed with the statement: "Nobody should be forced to retire because of age if he wants to continue working and is still able to do a good job." The report further noted that four out of five readers of Nation's Business responding to the question "Should retirement be mandatory at a certain age?" said no.

contrary, that a mandatory retirement plan, which removes the option to continue working, particularly at this unusually young age, makes the Foreign Service less attractive and thus impairs the Service's general recruitment activities rather than enhances them.

On the other hand, as we have seen, an average of only 44 Foreign Service officers remain in the Service until even their 60th birthday. Thus, as a practical matter, it is not likely that would-be officers are going to be deterred from joining the Foreign Service out of fear that appreciably large numbers of officers will work after 60 in the absence of a mandatory retirement law, and thereby deny them adequate promotional opportunities.

Appellants' allegation (Gov. Br. 31) that large numbers of 60-year-old Foreign Service employees are now staying in their jobs as a result of the district court's decision in this case below is highly misleading. Assuming that appellants' figures that some 80 employees have stayed during this past year are correct (they are not in the record and appellants cite no source for them), the appellants completely fail to point out that a recent substantial pay raise has temporarily slowed down the rate of all voluntary retirements because of the fact that Foreign Service pensions are based on the highest salary received for three consecutive years. Prior to February 1977, Foreign Service employees, like other Federal workers, were limited to a maximum annual salary of $36,000. In February 1977, the ceiling was lifted to $47,500. Thus, there has been a significant financial incentive to remain employed until February 1980. In recognition of this fact, amicus AFSA recently requested Congress to enact legislation permitting officers retiring between

October 1, 1978, and December 31, 1979, to compute their annuity on the basis of their highest single year of salary rather than, as is usual, on the basis of an average of the highest three years. The committee report discussing the proposal noted that its purpose was to alleviate an unusual and temporary slow-down in retirements. Sen. Rep. No. 842, 95th Cong., 2d Sess. 25."[43]

Certainly, in view of the fact that most Foreign Service employees have traditionally opted to retire voluntarily before 60, it is inherently incredible that more of them would now suddenly seek to stay on after 60 simply because of a court decision telling them that they may do so. Moreover, the government's own statistics indicate that most government employees do not choose to work beyond mandatory retirement age and that this reflects general societal retirement patterns."[44]

---

[43] The Conference Report on H.R. 12598, the Foreign Relations Authorization Act for Fiscal Year 1979, H. Rep. No. 1535, 95th Cong., 2d Sess. 19 (Sept. 8, 1978), recommended the adoption of the proposal.

[44] Senate and House Committee reports on the recent amendments to the Age Discrimination in Employment Act summarized the trend in recent times toward early retirement. It was noted, for example, that in 1974, 72% of all new Social Security retirees opted for reduced benefits with age 62 as the overwhelmingly most common age. Sen. Rep. No. 493, 95th Cong., 1st Sess. 31 (additional views of Senator Javits). The House report noted that "[o]nly a few Federal employees choose to work up to or beyond mandatory retirement age." In 1976, only 1,509 workers under civil service were mandatorily retired. H. Rep. No. 527, 95th Cong., 1st Sess. 12.

C. Appellants' Claim That Mandatory Retirement Creates Promotional Opportunities For Younger Officers and Thereby Enhances Incentive and Morale Is Legally Invalid and Has No Support In The Record Or Logic

Appellants argument (Gov. Br. 8-9, 29) that mandatory retirement at age 60 is rational because it creates promotional opportunities for younger officers in a work force where there are few high level positions, and also thereby enhances their incentive and morale would equally justify any retirement age for any kind of employee regardless of any capability of human beings at that age to perform the work involved.

Appellants state (Gov. Br. 29) that the mandatory retirement age creates "room at the top" for younger employees. We concede that a variety of budgetary and management factors will ordinarily contribute to lack of "room at the top" in any government agency for all who desire to be there. As we noted above, there has been an increased number of appointments to the top positions of the Foreign Service in recent years from outside the pool of career officers. Budgetary restrictions and personnel ceilings imposed by the executive branch and Congress can also limit the number of promotions in any given year. Thus, we assume, *arguendo,* that there are more Foreign Service officers desiring ambassadorial and other high positions than there are positions to be filled. We further assume, *arguendo,* that reducing the number of applicants for governmental jobs is an objective having some legitimacy. We submit, however, that a mandatory retirement law does not survive the rational basis test simply because it reduces the number of applicants for a limited number of jobs. Since the means of achieving

the objective is arbitrary, the classification is inconsistent with equal protection guarantees.

In *Reed* v. *Reed, supra,* the disputed statute provided that where competing applications for letters of administration of estates of persons who died intestate are filed by both male and female members of the same entitlement class, the male was to be favored over female. The Idaho Supreme Court upheld the statute on the ground that it eliminated the need for hearings on the merits when two or more persons equally entitled sought letters of administration and thus reduced the workload on probate courts. Even though this Court conceded that the State's proffered justification for the statute could be said, as a matter of logic, to bear a rational relationship to a legitimate state objective, this Court nonetheless held that the classification violated the Constitution's equal protection guarantees. The Court stated (404 U.S. at 76):

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.

Appellants' suggest that the statute is valid because the promotion of younger officers enhances incentive and morale in the workforce. However, appellants have submitted no evidence that the retirement provision does in fact enhance incentive and morale. As Judge Aldrich noted in the three-judge court's decision in *Murgia,* 376 F. Supp. 753, *supra* (at 754-755):

> We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are

only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness. The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. * * * The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination *per se*.

The inherent conflict referred to by Judge Aldrich is reflected in this case. The collective bargaining representative for the officers in the State Department, AFSA, has filed an amicus brief in support of appellants. The collective bargaining representative for the employees in ICA, the American Federation of Government Employees (AFGE), has requested the Court's permission to file an amicus brief in support of appellees. The Thomas Fund, an employee organization whose membership consists of employees in all three foreign affairs agencies, is a plaintiff in this case. Ten employees are also plaintiffs in this case. Elsworth Bunker, a long-time career officer and currently Ambassador at Large, recently wrote:

> [T]he automatic retirement of a large number of our citizens who are willing and able to continue work is one of the more troublesome and inequitable problems of our time. While I appreciate the need to maintain a reasonable degree of opportunity for the advancement of young talent, it does strike me that we have been somewhat arbitrary in the past in denying to the nation the experience, creativity and productivity of senior Americans.[45]

[45] Hearings before the Select Committee on Aging, 95th Cong., 1st Sess., May 25, 1977 (letter submitted for the record, June 1, 1977).

Appellants further state (Gov. Br. 9) that mandatory retirement "creates incentives for superior performance." However, as we have seen, so few Foreign Service officers remain, or can reasonably be expected to remain, in the Foreign Service until even their 60th birthday that it is not logical to assume that officer incentive will be significantly affected by the elimination of mandatory retirement. Moreover, those few officers who elected to remain after age 60 will still be subject to selection out on the basis of performance and for medical reasons, and thus younger officers who are more capable than they will still have opportunities to succeed them and therefore will be motivated to demonstrate their capability. Moreover, those officers who are approaching age 60 and who wish to continued to work will be motivated to perform well in order to attain or retain interesting and challenging assignments and to keep from being selected out.[46] Indeed, they may well be more motivated than they are under a system where mandatory retirement looms in the future. We submit that the record in this case provides no basis for concluding that it is necessary to provide incentives and protect the morale of the Service by advancing one group of employees at the expense of others on the arbitrary criteria of age rather than on the criteria of merit.

[46] The Foreign Service, unlike most government agencies, has broad administrative flexibility in making assignments. As amicus AFSA notes (AFSA Br. 6), a Foreign Service officer can be assigned to perform any job in the Foreign Service regardless of rank. Thus, a Class 3 officer may well be assigned to perform work previousiy performed by a Class 2 or a Class 4 officer. An officer may be assigned to any overseas post and may be reassigned in the interests of the Service at a moment's notice. He or she may also be assigned to work in other federal agencies (22 U.S.C. 961a), in State, county or municipal governments, in private organizations (22 U.S.C. 966), and to universities (22 U.S.C. 963).

Appellants seek (Gov. Br. 28) to draw support for their argument that failure to mandatorily retire 60-year-olds will lower the opportunities for advancement and the morale of younger officers seeking quick promotions from this Court's decision in *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975). That reliance is misplaced.

Schlesinger v. *Ballard* involved a selection out provision in federal law governing the United States Navy that required certain male naval officers who twice failed to be promoted to be mandatorily discharged. A naval officer discharged under this provision complained that women naval officers were entitled to a longer period of time than male officers in which to be promoted and that his selection out was therefore a denial of equal protection. This Court held, for reasons not material here, that the statutory distinction between men and women naval officers had a rational basis. In describing the Navy's promotion and selection out procedures for failure twice to be promoted, this Court noted (419 U.S. at 502):

> Because the Navy has a pyramidal organizational structure, fewer officers are needed at each higher rank than were needed in the rank below. In the absence of some mandatory attrition of naval officers, the result would be stagnation of promotion of younger officers and disincentive to naval service. If the officers who failed to be promoted remained in the service the promotion of younger officers through the ranks would be retarded. Accordingly, a basic "up or out" philosophy was developed to maintain effective leadership by heightened competition for the higher ranks while providing junior officers with incentive and opportunity for promotion.

This Court did not say in *Ballard* that in any governmental organization having fewer jobs at the top than the bottom, any sort of mandatory attrition program, regardless of how arbitrary, is justified in order to advance those at the bottom to the top regardless of merit. Rather, the Court described a selection out system that involuntarily retires employees on the basis of merit, not a system involuntarily retiring employees on the basis of age for which there is no evidence of any relationship to merit. As we have seen the Foreign Service has the capability to carry out such a system of merit selection, as was described by the Court, by selection out for time in class (*i.e.,* lack of promotion) and for poor performance. There is nothing in *Ballard* which suggests approval of going beyond such decisions on the basis of merit to using the arbitrary criterion of age.

Moreover, appellants are in error in suggesting (Gov. Br. 28-29) that the Navy and Foreign Service personnel systems are so similar that unless there is mandatory retirement there will be stagnation in the Foreign Service comparable to that which would result in the Navy if officers failing to be promoted were not selected out. Unlike the Navy system described in *Ballard,* Congress has not established any fixed number of officers for any class. Instead, the appellants have broad administrative flexibility under the Act (22 U.S.C. 886) to determine the number of positions in each class. In deciding how many promotions there should be to each class, appellants make annual determinations, taking into account a wide variety of factors such as budgetary levels, the management needs of the Service, the number of appointments and transfers from outside the career Service, the numbers and varying talents of the existing workforce, the estimated

numbers of departures for all reasons, and other variables."[47]

Appellants' argue (Gov. Br. 29) that a younger officer must be promoted in order to stay in the Service. It is true that an officer whose performance ratings year after year are insufficient to earn a place on the promotion list will be selected out. However, the appellants have broad authority under the Act (22 U.S.C. 1003) to determine administratively the number of years in which officers may remain in class without promotion. The appellants can and do adjust these periods and have tolled selection out for officers who have been recommended for promotion but for whom there have been no positions available in the next higher class."[48]

---

[47] A description of this process is set forth in the March, 1978 issue of the *Department of State Newsletter*, p. 5.

Amicus AFSA is in error in stating (AFSA Br. 10) that promotions are available only when an officer leaves a class, as is the case in the Navy where the number of positions at each rank is set by statute, and that when an officer is retired this opens up promotions throughout the system. In fact, as noted above in the text, the number of promotions available to a particular class in the Foreign Service is administratively determined each year and the determination is made on the basis of a number of factors other than retirements including an administrative determination of the numbers desired by appellants to be in each class. Thus, the total numbers in any given class will vary from year to year. Similarly, an officer's departure does not necessarily mean that an officer will be promoted to take his or her place.

[48] For example, in 1969, officers in classes 4 and 5 were permitted to stay in class for 8 years without promotion (unless they were selected out for low ranking). In 1976 appellants changed the rule administratively to permit officers in classes 3, 4 and 5 to remain in any combination of those three classes for 20 years and in any one class for 15 years. Each ICA officer in classes 2-5 was also given an additional year for each year he was recommended for promotion but not in fact promoted. See discussion of these changes in *News and Views*, Local 1812, AFGE, Nov. 8, 1976.

Appellants' final suggestion (Gov. Br. 29, note 30) that mandatory retirement allows them to plan the training and advancement of their employees is simply not credible in light of the many unpredictable variables they now have to take into account apart from mandatory retirement in planning for utilization of the workforce."[49]

In sum, there is no basis in this record for concluding that promotional opportunities would be significantly interfered with by elimination of mandatory retirement at age 60. Similarly, there is no basis for concluding that Service morale or incentive, or the Service's need to plan, depends on mandatory retirement. Moreover, even if it is assumed that mandatory retirement will have the necessary result of creating promotional opportunities for some younger officers, a classification for the purpose of benefiting younger employees over older ones on the sole basis of age is discrimination *per se* and thus it does not bear a fair relationship to a legitimate governmental end.

---

[49] The special report of the House Select Committee on Aging, Mandatory Retirement: The Social and Human Cost of Enforced Idleness, supra, p. 35, states that the notion that mandatory retirement plans create an element of predictability is questionable when examined closely.

> Since persons may become ill, change jobs, or voluntarily retire any time before the mandatory age and since companies now chart, project and adapt to such behavioral patterns, the contention that mandatory retirement introduces necessary predictability into the system would seem to have little merit. Patterns of voluntary and involuntary retirement would emerge once mandatory retirement is abolished. If the assumption underlying this contention were correct, companies which have banned mandatory retirement would now be floundering in chaos. They are not.

IV

This Case Involves Narrow Issues Concerning the Factual Basis for a Mandatory Retirement Age for One Particular Group of Employees

We emphasize that the parameters of appellees' equal protection challenge are narrowly drawn. Appellants are therefore in error when they claim (Gov. Br. 29) that this challenge is essentially an argument for eliminating mandatory retirement altogether. Appellants have asserted only that they are entitled to work until age 70 and that there is no evidence of any diminished capacity to perform the work of the Foreign Service, including work overseas, between the ages of 60 and 70. This case does not encompass the question of whether Foreign Service employees above the age of 70 can be mandatorily retired consistent with the requirement of equal protection. This issue was not argued below, evidence was not introduced on this issue, and the district court's ruling states only that appellants may not mandatorily retire appellees prior to the age of 70 (J.S. App. 8A.). Thus, appellants are correct (Gov. Br. 11) that we do not claim in this case that legislatures are prohibited from establishing a general mandatory retirement age for white collar workers such as the age 70 mandatory retirement provision that existed for all Civil Service employees at the time this suit was instituted. Appellants are mistaken, however, in suggesting (Gov. Br. 12) that we concede that an age 60 retirement law, if applicable to all government employees, would be valid. It can be reasonably argued that, given modern societal facts, any general mandatory retirement age for white collar workers below the age of 70 is presumptively invalid and can be ruled valid only if there is factual evidence

to justify the lowered age. At the very least, such a statute would have to be supported by an adequate factual basis having more, or at least many, workers at age 60 who are no longer able to perform adequately. It is exactly this evidence which is missing here. It can also be reasonably argued that all mandatory retirement laws for white collar workers at any age are invalid and individualized determinations should be made instead. However, these issues are not present in this case and appellees, therefore, take no position on them.

Contrary to appellants' claim (Gov. Br. 12), we do not contend that legislatures cannot set different retirement ages for differing groups of employees. So long as there is a rational basis to sustain each retirement age, there can be any number of them.[30] The gravamen of appellees' complaint is that there is no evidence of a rational basis in this case to sustain retire-

---

[30] It is of course immaterial whether the differing retirement ages are set forth in a single statute or in separate statutes. In *Murgia*, this Court held that the state statute which established a separate employment and retirement system for that group of state employees serving in the uniformed branch of the state police force survived an equal protection challenge that the separate classification was irrational because of the undisputed difference in work demands that underlay the job classification. 427 U.S. at 315, note 8. Similarly, it does not matter whether the present case is viewed as one in which the legislature has in a single statute—the Foreign Service Act—provided for differing treatment of those under 60 and those over 60, or one in which the legislature has by separate statutes established one rule for 60 to 70 year old government employees performing white collar jobs generally and another rule for 60 to 70 year old employees performing comparable white collar jobs in the Foreign Service. Absent an evidentiary showing, like that in *Murgia*, that the work in the Foreign

ment of Foreign Service employees between the ages of 60 and 70.

Similarly, appellants are in error when they state (Gov. Br. 34) that the district court "ruled that Congress could not constitutionally maintain different mandatory retirement ages" for differing categories of government employees. The district court simply held that the evidence in this record demonstrated that the age retirement provision at issue lacks a rational basis. The court did not rule that the government is prohibited from providing for early retirement in the cases of policemen, firemen, air traffic controllers, Armed Forces personnel, or other persons in demonstrably hazardous jobs such as the uniformed patrolman's job in *Murgia* where declining physical ability due to advancing age can fairly be said to pose a risk to the public safety. Indeed, it is still open to the Government to demonstrate that some particular jobs in the Foreign Service are in this category.[51]

The appellants' claim (Gov. Br. 34) that, if the district court's decision is upheld, it "could lead to invalidation on equal protection ground of all distinctions between the Civil Service and the Foreign Service" is

---

Service is so demanding that post-60 year olds cannot perform it as ably as younger employees or that the work is so much more demanding than the jobs required of other, more favorably treated, government employees, the lowered retirement age is invalid.

[51] Procedures are available to appellants under ADEA to establish age limitations for specific jobs. The Act allows an age limitation to be set upon a showing to the Civil Service Commission that age is a bona fide qualification for a particular job. 5 U.S.C. 633a, as amended.

also without merit. Neither the *Murgia* case nor *Kelley* v. *Johnson,* 425 U.S. 238 (1976), cited by appellants (Gov. Br. 35, note 35), nor any other case of which we are aware, supports the appellants' view. If there had not been sufficient evidence to establish the rationality of the age limit in *Murgia,* or the hair length requirement in *Kelley,* a decision by this Court to that effect would not have meant the constitutional invalidation of all distinctions between the state police forces in those cases and other state government employees. Similarly, in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) this Court's invalidation of an employment condition affecting pregnant women (requiring them to retire when six months' pregnant) did not mean elimination of all distinctions between the state school teacher employment system and all other state government employment systems. Similarly, the decision below does not prohibit the government from legislatively creating different employment rules for different jobs. The armed forces, the Postal Service, the Peace Corps, the Health Service, and other employee groups can continue to be subject to their own separate employment rules and conditions.[52] The Foreign Service can continue, as the district court specif-

---

[52] The decision below does not prohibit the government from setting a term of years in which an employee can serve in any particular job. For example, by statute individuals can be employed in the Peace Corps for not more than five years, 22 U.S.C. 2506(a)(2). (However, such employees can serve five years even if they are aged 65 or 70 and thus the classification does not discriminate on the basis of age.) Congress similarly can limit service in the Foreign Service to a term of years if it so chooses. So long as such term of service is not irrationally predicated upon age, when age has no bearing on ability to perform the jobs in question, such a provision would presumably be valid.

ically recognized (J.S., App. 8A) to have its own distinctive recruitment, promotion, pay and selection out features. Thus, Congress can offer higher pay and the option of earlier retirement to Foreign Service personnel as a recruitment device to offset the inconvenience of moving many times and living away from the United States for periods of time, and to offset the uncertainties of pursuing a career which includes annual reviews and selections out. Such benefits serve the rational governmental purpose of recruiting well-qualified personnel into the Foreign Service.

Nor does the decision below in any way limit the government's ability to hire, to promote, to assign, to demote, and to discharge on the basis of ability to perform. President Carter has recently proposed a reorganization of the Civil Service, H.R. 11280, 95th Cong., 2nd Sess. (1978). One feature of the new proposal is the establishment of a category of high-ranking civil servants who will be rewarded and promoted according to performance and who will be demoted to lower rankings if their performance is inadequate. Similarly, there is nothing to prevent the Foreign Service from instituting such demotions. As we have seen, the appellants already have authority to assign employees to any post and to perform any work, regardless of rank. And, of course, the decision in no way limits the Foreign Service's already existing authority to select out officers on the basis of performance. Similarly, the decision in no way limits the existing authority of the Foreign Service to discharge its personnel for medical reasons.

V

There Is No Support in the Record or in Law for Appellants' Claim That Mandatory Retirement at 60 Is Rational Because the Foreign Service Employment System Provides Special Advantages

Appellants contend (Gov. Br. 32) that since Foreign Service employees enjoy "numerous special advantages" from employment in the Foreign Service that they would not receive under other government employment systems, they cannot complain about any condition of that employment. We submit that, even if it were true that Foreign Service employees are advantaged over other government employees, which we dispute, this fact is irrelevant in an equal protection case.

We know of no equal protection case in which this Court has held that merely because one is obtaining some benefits under the statute at issue, one may not challenge discriminatory aspects of it. If that were the law of the land, then this Court in *Murgia* would simply have disposed of the plaintiff policeman's equal protection claim on that basis. As we have been, this Court, in *Murgia* and in other cases, has analyzed whether the classification bears a fair and substantial relationship to a legitimate governmental objective and is not itself arbitrary. Appellants cite no precedential authority for its contention that the existence of other advantages arising from the employment is relevant to that analysis. Nor does it matter whether the benefits derived under a challenged statute are better than might be derived elsewhere. Surely, if an agency hired women for low ranked jobs at better pay than they could receive elsewhere for the same work but refused to promote them on the ground that they were women, they would not be barred from challenging the constitutionality of the non-promotion policy because they were receiving better pay.

Moreover, no evidence was introduced below concerning the advantages and disadvantages of Foreign Service employment. In fact, we submit there is no basis to support appellants' contention here that Foreign Service employees are appreciably advantaged over other government employees. Indeed, as the report on federal employment systems cited by appellants notes, the Foreign Service System has consistently lagged behind the Civil Service system in extending benefits to its employees. S. Doc. No. 14, 90th Cong., 1st Sess. 129 (1967).[53]

Appellants point (Gov. Br. 32) to the fact that the annuity for Foreign Service employees is based on 2% of the highest three-year average salary and that the Civil Service annuity is computed on the basis of 1.5% for the first five years, 1.¾% for the second 5 years, and 2% thereafter. They neglect to point out, however, that the Foreign Service total annuity is limited to a maximum of 70% of average pay whereas the Civil Service employee is permitted up to 80% of his average pay and that the Foreign Service employee

[53] The Rogers Act of 1924 required Foreign Service employees to contribute 5% of their earnings to their retirement system as compared to the 2½% required of Civil Service employees. This formed the model for treating Foreign Service employees on less favorable terms that continued in the following decades. For example, for many years, the Foreign Service Retirement System did not grant annuity benefits to dependent children of Foreign Service employees who died in service or during retirement or grant any annuity benefits to widowed husbands of female Foreign Service employees even though, under the Civil Service laws, such dependent spouses and children were eligible for annuities. Similarly, in 1962, the Civil Service raised a widow's survivorship benefits from 50 percent to 55 percent of an employee's average salary and extended survivorship benefits to student dependent children until they reached the age of 21 These benefits, however, were not extended to the Foreign Service until 1976. 22 U.S.C. 1065.

may not include more than 35 years of government service whereas the Civil Service employee may include all years of service. As a result of this and other differences in computing their annuity, a Civil Service employee who has consistently maintained equivalent positions to a Foreign Service employee may earn a larger annuity than the Foreign Service employee. For example, an individual who has been employed by the Civil Service since age 25 and whose highest three-year average salary was $25,000 will receive an annuity of $19,062.50 per year if he retires upon reaching age 65. On the other hand, a Foreign Service employee who commenced working in the Foreign Service at the age of 25 and whose highest three-year average salary was $25,000 would receive a maximum annuity of only $17,500 per year upon mandatory retirement at age 60.[54] In addition, the Foreign Service employee, who cannot continue his career past the age of 60, is thus required to live during the five year period between 60 and 65 on a substantially lower income (that is, an annuity income) than that earned by a comparable employee in the Civil Service who continues to work. Even if the Civil Service employee chooses to retire at the age of 60, he will earn an annuity of $16,562.50 per year, or only $937.50 per year less than the annuity

[54] The Foreign Service annuity is computed on the basis of 2% of the average salary for the highest three consecutive years of service, multiplied by the number of years served, not to exceed 35. 22 U.S.C. 1076. The Civil Service annuity is computed on the basis of 1.5% of the average salary for the highest three years, multiplied by the number of years not to exceed five years, plus 1.75% of the employee's average pay multiplied by the number of years of service which exceed five but do not exceed 10, plus 2% of the average pay multiplied by the remaining number of years of service. 5 U.S.C. 8339(a).

issued to a comparable Foreign Service employee. Inasmuch as the Foreign Service employee probably assumed greater inconveniences and job security risks than the comparable Civil Service employee—such as being subject to changing world assignments, and to selection out at any time—the small difference in retirement pay is hardly a substantial advantage.

There is also no factual basis for appellants' claim (Gov. Br. 33-34) that appellees are attempting to "improve their lot by eliminating a condition of employment that they see as less favorable than the comparable Civil Service rule, while retaining the conditions of employment that are more favorable than the comparable Civil Service conditions." As we have seen, the conditions of Foreign Service employment in the aggregate are not necessarily more favorable than comparable Civil Service conditions. We presume that appellants are referring to the option in the Foreign Service of early voluntary retirement at age 50 when they refer to "favorable conditions" since Civil Service employees may not voluntarily retire with pension until age 55. Even if we assume that the option of early voluntary retirement at age 50, when considered by itself, is a more advantageous employment benefit than that which exists in the Civil Service, those Foreign Service employees who continue to work after age 60 (and are not subsequently selected out or medically discharged) will be foregoing that benefit. Obviously Foreign Service employees will not be able both to work past age 60 and choose voluntary early retirement. Thus, appellants are not attempting to obtain the alleged special benefit of the Foreign Service retirement system without accepting its disadvantages.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

ZONA F. HOSTETLER
BRUCE J. TERRIS
EDWARD H. COMER
1526 - 18th Street, N.W.
Washington, D.C. 20036
(202) 332-1882

Attorneys for Appellees

September 22, 1978

No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

---

AMICUS CURIAE BRIEF OF AMERICAN FOREIGN SERVICE ASSOCIATION IN SUPPORT OF APPELLANTS

Attorney for the Amicus Curiae
CATHERINE WAELDER
AMERICAN FOREIGN SERVICE ASSOCIATION
2101 E Street, N.W.
Washington, D.C. 20037
(202) 293-3806

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

---

AMICUS CURIAE BRIEF OF AMERICAN FOREIGN SERVICE ASSOCIATION IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the American Foreign Service Association files this Brief as *amicus curiae* in support of the Appellants.

QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, as amended, which requires participants in the Foreign Service Retirement System to retire at age 60, violates the equal protection guarantees embodied in the due process clause of the Fifth Amendment.

STATEMENT OF INTEREST OF AMERICAN FOREIGN SERVICE ASSOCIATION

The American Foreign Service Association (AFSA) is the exclusive bargaining representative for approximately ten thousand Foreign Service employees in the Department of State and the Agency for International Development, certified under the terms of Executive Order No. 11636, *reprinted in* 22 U.S.C. § 801, at 383 (1976). The Association is also the professional association of both active and retired Foreign Service personnel from all the foreign affairs agencies. Established over fifty years ago, AFSA's current membership is 6,096.

The Association's interest in the mandatory retirement statute is to enhance the capability of the foreign affairs agencies to represent the foreign policy interests of the United States abroad and to assure an orderly process of promotion and career development within the Service, thereby encouraging employee morale and providing incentives for the highest quality performance.

SUMMARY OF ARGUMENT

The guarantee of equal protection of the laws embodied in the Fifth Amendment requires that the law apply in a like manner to individuals or groups in like circumstances. Legislative classifications which provide for differing treatment of individuals or groups are valid where such groups have different characteristics and are not similarly situated with respect to the distinction made. The Civil Service and the Foreign Service differ in many of their respective terms and conditions of employment, and these groups of employees are not similarly situated with respect to the requirement for mandatory retirement at age 60 in the Foreign Service.

Moreover, even if the Foreign Service and the Civil Service were similarly situated, mandatory retirement

of Foreign Service employees at age 60 serves the legitimate needs of the government in at least two ways. *First*, the government's need to maintain a balanced workforce in the foreign affairs agencies, with a reasonable distribution of employees of varying ranks, is served by the requirement that Foreign Service employees retire by the age of 60. *Second*, the long periods of overseas duty which are required in the course of a Foreign Service career can have debilitating effects on employees. Foreign Service employees are needed worldwide and must be able to serve the needs of the government's foreign policy under virtually any circumstances. The Congress chose a rational means of meeting these needs by establishing age 60 as the mandatory retirement age for Foreign Service employees.

Legislative history of the Foreign Service retirement provisions indicates that the Congress had both purposes in mind in enacting an earlier retirement age for Foreign Service employees than the applicable age for Civil Service personnel. Relevant portions of the reports of the committees of Congress and of Congressional debates reflect these purposes.

The decision of this Court in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), is controlling in this case. The Court there upheld a requirement that uniform state police officers retire at age 50, finding that the state had a legitimate purpose in ensuring that its police officers would be able to respond to the demanding requirements of the job, and that retirement at age 50 was a rational means of meeting the state's needs. The United States has an equally legitimate need to maintain a fully effective complement of Foreign Service employees able to serve under sometimes difficult and hostile conditions, and the legislative choice of mandatory retirement at age 60 as a means to meet those needs was a rational choice. Compensatory features are

included in other provisions of the retirement system. Mandatory retirement at age 60 does not deny appellees the equal protection of the laws guaranteed by the Fifth Amendment.

ARGUMENT

I. THE FOREIGN SERVICE AND THE CIVIL SERVICE ARE NOT SIMILARLY SITUATED WITH RESPECT TO THE MANDATORY RETIREMENT AT AGE 60 PROVISION OF THE FOREIGN SERVICE ACT.

The district court erred when it found no rational basis for the requirement that Foreign Service personnel retire at age 60, whereas Civil Service employees are not subject to mandatory retirement until the age of 70. *Bradley* v. *Vance*, 436 F.Supp. 134 (D.D.C. 1977). A rational basis clearly does exist for the distinction between Foreign Service and Civil Service employees which justifies the earlier mandatory retirement age for the Foreign Service. As a threshold matter, however, the district court erred in its implicit assumption that Foreign Service and Civil Service employees are similarly situated with respect to the mandatory retirement at age 60 provision of the Foreign Service Act. Only if these employees are similarly situated does the earlier mandatory retirement age require a rational basis to support the legislative distinction.

The Constitution requires that individuals in like circumstances be treated alike under the law. It does not guarantee equal treatment to persons in different circumstances. It does not preclude the Congress from establishing a separate Foreign Service of the United States as a category of government employment, and from providing for many areas of unequal treatment of Foreign Service and Civil Service employees. Where a particular category of government employment has been

created to meet particular needs, it is inevitable that the conditions of employment in that Service will differ from certain of the conditions of employment in another category established to meet other needs. The Foreign Service was created as a unique type of employment, designed to meet the particular needs of the government in the implementation of foreign policy. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

With the passage of the Act of May 24, 1924, ch. 182, 43 Stat. 140 (the Rogers Act), Congress consolidated the separate Diplomatic and Consular Services into a unified Foreign Service of the United States. The Rogers Act provided the basis for the establishment of a career Foreign Service corps. It was to be composed of individuals selected on the basis of merit, who would be trained as professionals to represent the interests of the United States abroad in the areas of foreign policy and diplomacy and provision of consular services. The Foreign Service is excepted from the competitive Civil Service. Foreign Service personnel are subject to a unique and highly competitive set of personnel policies and procedures designed to meet the special needs of the government in the implementation of foreign policy.

In enacting the Foreign Service Act of 1946, 60 Stat. 999 (codified at 22 U.S.C. §§ 801 to 1158 (1976)), the Congress again articulated its objectives, including among them the desire "(1) to enable the Foreign Service effectively to serve abroad the interests of the United States; . . . (4) to provide improvements in the recruitment and training of the personnel of the Foreign Service . . . and (9) to codify into one Act all provisions of law relating to the administration of the Foreign Service." 22 U.S.C. § 801 (1976).

Foreign Service employees are required as a condition of employment to accept assignment in any area of the world in the interests of the Service. A Foreign Service employee can expect to spend the majority of his or her career overseas, and is likely to serve in several hardship or unhealthful posts in the course of such a career. An employee is normally transferred every three or four years, and may be transferred at any time, frequently with little or no advance warning. The Service is very mobile, and it seeks and hopes to retain highly-motivated individuals with a primary commitment to the best interests of the United States. Such service exacts a high price in terms of family stability, educational and employment opportunities for dependents, long-term health care and medical problems, and terrorist dangers. Mandatory retirement at age 60 is an integral part of the personnel laws and regulations applicable to Foreign Service employees.

Foreign Service employment and Civil Service employment differ in a number of respects. For example, Foreign Service employees are appointed to a class (a category analogous to a military rank), rather than to a position, as would be typical in the Civil Service and most private employment. 22 U.S.C. §§ 867, 869, 870 (1976). Assignments are made in the interests of the Service; employees are not hired for a particular post. 22 U.S.C. §§ 906, 909, 923, 937 (1976). Foreign Service officers are subject to selection-out (termination) for excessive time in a given class, or for performance which fails to meet the standard of the class, neither of which are applicable to Civil Service personnel. 22 U.S.C. § 1003 (1976).

There are numerous differences in the Foreign Service and Civil Service retirement systems, with the Foreign Service system somewhat more advantageous in a number of respects. Foreign Service employees covered under the

Foreign Service Retirement System may elect to retire at age 50 with 20 years' service. 22 U.S.C. § 1006 (1976). Civil Service personnel must generally wait until age 60 to retire with 20 years' service. 5 U.S.C. § 8336 (1976). Moreover, Foreign Service employees are entitled to a somewhat larger annuity computed by multiplying the number of years of service (not exceeding thirty-five years) by a figure representing two percent of the highest average salary for three consecutive years. 22 U.S.C. § 1076(a) (1976). Computation of annuities for Civil Service personnel is based upon a figure representing less than two percent of an employee's salary for the first ten years of service, followed by a figure representing two percent of salary for the remaining years. 5 U.S.C. § 8339(a) (1976). This distinction causes fairly substantial differences in the amount of the pension due to an employee. Other differences also exist between the two systems, including a provision in the Foreign Service Act for extra credit toward retirement which may be earned when assigned to overseas posts classed as unhealthful. 22 U.S.C. § 1093 (1976).

These legislative differences make it apparent that the Foreign Service and the Civil Service are not similarly situated with respect to the requirement that Foreign Service employees retire at age 60. Equal protection of the law does not require that these different groups of individuals, employed under different conditions and for different purposes, be treated alike.

II. MANDATORY RETIREMENT FOR FOREIGN SERVICE EMPLOYEES AT AGE 60 IS CONSTITUTIONAL BECAUSE IT BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE GOVERNMENTAL PURPOSE.

This Court has held that a discrimination or distinction is constitutionally permissible if that distinction is rationally related to a legitimate state concern. In *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), the Court held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Where a particular classification does not interfere with the exercise of a fundamental right or operate "to the peculiar disadvantage of a suspect class," strict scrutiny of that classification is not required. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976); *Accord, San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973); *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961).

The Congress had a dual purpose in requiring that employees covered under the Foreign Service Retirement and Disability System retire at an earlier age than employees in the Civil Service. This distinction has existed since the enactment of the Rogers Act in 1924, and the Congress has repeatedly articulated its purposes when the law has been amended over the past fifty years. The government has a valid interest in maintaining a Foreign Service which is balanced by age and rank, and the earlier mandatory retirement age serves the needs of the Service in providing opportunity for upward mobility and progressive career development for other employees in the Service. The government has an equally legitimate need to be assured of the ability of its Foreign Service employees to serve at any post overseas, often at hardship posts on short notice.

It was not irrational for Congress to require Foreign Service employees to retire at age 60 in furtherance of these legitimate governmental interests. Moreover, the burden of proving a lack of a rational basis for such a distinction properly should fall to the party seeking to show the lack of rationality. The district court's ruling was based only upon the limited record before it on cross-motions for summary judgment. The court was in error in substituting its judgment on the needs and requirements of the Foreign Service for the judgment of the Congress.

A. The Government Has a Valid Interest in Maintaining a Foreign Service Balanced by Age and Rank.

The Foreign Service Act provides for ten classes of Foreign Service Officers, including Classes 8 through 1 and the classes of career minister and career ambassador. 22 U.S.C. § 867 (1976). There are eight classes of Foreign Service Reserve Officers, 22 U.S.C. § 869 (1976), and ten classes of Foreign Service Staff Officers and employees, 22 U.S.C. § 870 (1976). Initial appointment is typically in the lower ranking classes.

The number of Foreign Service employees and the number of positions in the foreign affairs agencies are established by executive request and legislative disposition in the authorization and appropriations process. The size of the Foreign Service has remained relatively stable in recent years.

Promotions in the Foreign Service are made in accordance with the findings of Selection Boards, specially convened on an annual basis to evaluate the performance of employees in a given class and to prepare a rank order list by class, or by specialization within a class, of those employees under review. 22 U.S.C. § 993 (1976). Selection Boards are guided in their function by Precepts,

which are the result of negotiation between agency management and the exclusive representative organization.

The number of promotions available to employees in each class (or specialty within a class) in the Foreign Service is dependent upon the total permitted by budget and the vacancies in corresponding positions at the next higher class. Promotions are available to a given group of employees only when employees in the class or classes above leave their class—by retirement, death, resignation, separation, selection-out, or promotion to the next higher class. When a Class 1 employee retires at age 60, that retirement opens up possible career development and promotion opportunities for people in each of the classes below Class 1, as each class starting with the lowest in rank has the opportunity to have one employee advanced to the next higher class. When an employee does not retire as anticipated, those promotion opportunities which would have been available upon the employee's retirement are all foreclosed. The foreign affairs agencies may not permit the number of persons advanced to senior classes to become disproportionate to the number of positions available to the agencies at the senior levels. Opportunities for advancement are created only when there are vacancies in higher classes; where no vacancies are available, the detrimental effect is felt throughout the Service. The preponderant number of vacancies at the senior level are created by retirements. This direct linkage makes mandatory retirement a necessary tool in permitting an appropriate distribution of personnel at various ranks and ages within the Service in order to fulfill the various needs of the agencies and to allow for rational planning of personnel and resources.

The Foreign Service requires a workforce with experiences and skills that are continually relevant to changing international developments. Such a system requires a career development process which moves employees

through an evolving series of assignments, both abroad and in the United States. The process of continuous updating and renewal of skills is based upon a promotion-up or selection-out system applicable to Foreign Service officers, which maintains the best-qualified officers readily available at all grade levels. In this system, Foreign Service officers below the class of career minister are subject to selection-out of the Service should their performance not continue to meet the standard required of the officer's class, or should the officer fail to be promoted to the next higher class within a given time period prescribed by regulation. 22 U.S.C. § 1003 (1976). The foreign affairs agencies must use selection-out on a greater or lesser basis, depending on their personnel needs, the time an officer may remain in class, and the maximum period officers tend to remain in the Service. If attrition from the Service by retirement ceases to provide the needed vacancies in the Service, it is virtually inevitable that the agencies will have to rely more heavily upon the selection-out system to provide for internal mobility and to permit the requisite development and advancement of officers within the Service. This may in fact force officers in the middle of their careers out of the Service when they fail to secure promotions within the requisite time period, while officers at ages 60 to 70 may remain in the Service. Since the size of the personnel system is relatively stable, providing a benefit to officers over the age of 60 by permitting them to remain within the system necessarily takes away the same benefit from employees under the age of 60, who lose promotion opportunities and may become subject to selection-out for failure to secure promotion within the requisite time. Moreover, the more junior employees would be too young to be eligible for a pension. Such stagnation in the personnel system would force mid-career employees to seek employment elsewhere, due to the lack of opportunity

in the Foreign Service. It also limits the efforts of the Foreign Service to become more "broadly representative of the American people" as required by the objectives of the Foreign Service Act, 22 U.S.C. § 801 (1976).

Mandatory retirement at age 60 enables the Foreign Service to maintain a balanced complement of employees, rationally distributed by qualifications, age, and rank, to staff its positions. Loss of this provision may severely harm employees currently in the Foreign Service. The retirement provision helps insure that persons entering the Service at the lower ranks will have realistic hopes of advancement in the course of their careers. It encourages the highest performance as employees strive to be chosen for promotion. It facilitates a continuing renewal of employee experience and skills. These are legitimate needs of a large government agency, and mandatory retirement at age 60 rationally furthers these goals.

B. The Government Has a Legitimate Interest in Maintaining a Complement of Foreign Service Employees Vigorous and Capable of Handling Frequent Transfers and Long Overseas Assignments.

The foreign affairs agencies have limited resources, in terms of personnel and finances, to meet the requirements imposed upon them by the President and by Congress. Employees are required to be available for service worldwide, and individual considerations often must be submerged by the needs of the Service. Medical problems may be cumulative after long years of overseas service. The Court recognized in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), that "physical ability generally declines with age." 427 U.S. at 315. Selecting a cut-off point for mandatory retirement inevitably serves to require retirement of some individuals who remain physically capable of performing the work required. Age is not a suspect classification, and governmental employment is not a fundamental right. *Id.* at 313. It is necessary only for the Court to find that the distinction drawn by Congress is a rational distinction. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

The function of the Foreign Service employee overseas is to represent the interests of the United States abroad, primarily in the areas of foreign policy and national security. While the Foreign Service has a number of attractions as a career, and life in selected posts can be pleasant under normal circumstances, situations can change dramatically for the worse, often on short notice. Foreign Service employees may be caught in civil wars (as in Angola), stationed in areas of the world plagued by unrest (as in Zaire), involved in disaster relief operations (as in Tananarive), forced to evacuate post on little or no notice (as in Saigon and Vientiane), and involved as the target of terrorist attack or kidnappings (as in Beirut). It was not irrational for the Congress to select age 60 as the age beyond which fewer employees could withstand the rigors of constant transfers and the stresses which accompany life in another culture, sometimes in a hostile and rapidly changing environment.

C. The Establishment of 60 Years of Age as the Cut-Off Mark Is a Rational Means to Achieve the Government's Legitimate Purposes.

The Congress is not required to select the best possible means for determining which employees remain suited to continued Foreign Service employment as they age. It is incumbent upon the Congress only to choose a rational means of making this determination. If the means chosen by Congress are not perfect, that does not deprive appellees of equal protection of the laws under the Constitution. Foreign Service employment can be very demanding, and the Congress has chosen an even-handed

and workable means of determining when Foreign Service employees should be required to retire.

Mandatory retirement at age 60 serves to open up assignment and promotion opportunities for employees in the Service at the junior and middle levels. Such opportunities in turn give the agencies openings at the lower levels, where recruitment and training of new hires can be accomplished. The government needs to have a balanced distribution of employees in the Foreign Service, so that at any given time the agencies are staffed with employees of different ranks, different abilities and specialties, and different ages. If older officers over-encumbered the senior and middle ranks, middle and junior level officers might in consequence be forced out of the Service for failure to secure promotion within the requisite time period. Such attrition could eventually result in a Service without its necessary complement of experienced officers ready to be advanced to replace the current senior officers when they eventually retire voluntarily or are themselves selected out. The choice of age 60 to provide this necessary turnover in the personnel system was not an irrational decision.

III. LEGISLATIVE HISTORY SUPPORTS THE ASSERTION THAT CONGRESS INTENDED THE EARLIER FOREIGN SERVICE RETIREMENT AGE TO SERVE THIS DUAL PURPOSE.

Congress first created a separate retirement program for Foreign Service officers by the Act of May 24, 1924, ch. 182, 43 Stat. 140. The Act provided for mandatory retirement of Foreign Service officers at the age of 65, although the President in his discretion might retain an officer on active duty for an additional five years. 43 Stat. 144. Mandatory retirement was thus set five years earlier for Foreign Service employees than for Civil Service employees. *See* Act of May 22, 1920, ch. 195,

41 Stat. 614. The reason for the earlier mandatory retirement age was clearly explained by the sponsor of the 1924 Act, Representative John Jacob Rogers, as reflected in the following exchange during Congressional deliberations:

> Mr. ROGERS of Massachusetts. The foreign-service officer is going hither and yon about the world giving up fixed places of abode often rendering difficult and hazardous service of prime importance to the United States. . . .
>
> Mr. CELLER. You make the retiring age 65 years?
>
> Mr. ROGERS of Massachusetts. Sixty-five.
>
> Mr. CELLER. And the clerk in Washington in the field service is retired at 70 years of age?
>
> Mr. ROGERS of Massachusetts. There is added a provision that the Secretary of State may retain any man for five years if he finds it wise for the country to so retain him.
>
> I call to the attention of the gentleman the fact that the kind of service which these men must render involves going to the Tropics; it involves very difficult and unsettling changes in the mode of life. The consensus of opinion was that the country was better off to retire them, as a general rule, at 65. [Applause] 65 *Cong. Rec.* 7564-7565 (1924).

Over the years the Congress has provided for coverage of most other categories of Foreign Service personnel under the Foreign Service Retirement and Disability System. In 1960, at the time that Foreign Service Staff officers and employees were brought under the coverage of the Foreign Service retirement program, the Congress explained its intention:

> The Foreign Service retirement system is designed to give recognition to the need for earlier retirement age for career Foreign Service personnel who spend

> the majority of their working years outside the United States adjusting to new working and living conditions every few years. Staff personnel who serve for any length of time are subject to the same conditions. It is the committee's opinion that the advantages of the Foreign Service retirement system should be extended to those staff employees who give an indication of making their career in the Service. . . . Had these individuals remained under the civil service retirement system, they would not have had to retire mandatorily until age 70. A number of them would prefer to retire earlier while, in other cases, it is in the interest of the Service and of the individual that they retire earlier. H.R. Rep. No. 2104, 86th Cong., 2d Sess. 31, *reprinted in* [1960] U.S. Code Cong. & Ad. News 3425.

The Foreign Service Retirement System was established in recognition of the fact that the administration of overseas employees posed different problems than the administration of a domestic service. While the hardships involved and the need for rational personnel administration justified an earlier retirement age for Foreign Service personnel, Congress compensated for this inequality by making Foreign Service retirement somewhat more advantageous than Civil Service retirement. When Foreign Service personnel of the Agency for International Development were finally included under the Foreign Service Retirement System in 1973, the Congress emphasized that the Foreign Service Retirement program "provides more favorable conditions for re-retirement to compensate for some of the personal difficulties arising from overseas service." H.R. Rep. No. 93-388, 93rd Cong., 1st Sess. 46, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2845. Earlier retirement helps to ensure that the Service maintains employees with the intellectual and physical vitality necessary for continued duty overseas, especially in the lesser developed countries where medical facilities, living and working

conditions are less favorable than in the United States. Congress struck a balance which was thrown out of equilibrium when the district court invalidated one selective factor in that balance.

Earlier mandatory retirement also serves the Congressional purpose of making the Foreign Service both more attractive and more effective by improving the opportunities for advancement within the Service. When Congress enacted the Foreign Service Act of 1946, 60 Stat. 999, the mandatory retirement age was lowered from age 65 to age 60. 22 U.S.C. § 1002 (1976). At this time the Congress explicitly modeled the Foreign Service promotion system upon that of the Navy, requiring an "up or out" promotion process for continued tenure of officers in the Service. The personnel system was "designed to secure an orderly flow of promotions unimpeded by promotion 'humps' and exaggerated spreads between minimum and maximum ages in class, and to bring men to the top while still vigorous and receptive to new ideas." H.R. Rep. No. 2508, 79th Cong., 2d Sess. 85 (1946). According to the House Report accompanying the bill,

> The sections under this title prescribe the criteria as to length of service in classes which will determine whether officers are selected out or retired. In administration the length of service allowed in each class and the incidence of separations would be arranged to assure a reasonable pyramid of promotion. The Department of State plans call for a correctly balanced service that would be constructed so that the size of the various classes would correspond with the distribution of the work load of the Service. Most separations should occur near the top (for age or through voluntary retirement) or at the bottom, while the men selected out in the middle classes and at middle ages would be limited. H.R. Rep. No. 2508, 79th Cong., 2d Sess. 90 (1946).

Thus, mandatory retirement at age 60 serves the legitimate purpose of providing room for normal career advancement among employees of the Service.

In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), this Court recognized the validity of a statute designed to serve the Navy's personnel needs by mandatory attrition. The Court found that "the operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realisticaly look forward to higher levels of command." *Id.* at 510. The Court upheld a statutory distinction between male and female commissioned officers regarding the allowable time period of commissioned service prior to mandatory discharge for want of promotion. Finding that the "up or out" philosophy maintained effective leadership by increasing competition and by providing incentive to more junior officers and opportunities for promotion, and recognizing that the determination of the means by which the Armed Forces maintains the military preparedness of the United States rests primarily with Congress, the Court found no violation of the due process clause of the Fifth Amendment in the means chosen. *Id.* at 502, 503, 510.

This need is served in some measure in the foreign affairs agencies by selection-out, but it is also served in large measure by the choice of age 60 as the age for mandatory retirement. Selection-out cannot serve the same purpose, for not all employees are subject to selection-out under the terms of the Foreign Service Act. 22 U.S.C. § 1003 (1976). This choice by Congress of a means to assure an orderly flow of promotions and a reasonable distribution of employees of various ranks within the Foreign Service was a permissible means to serve the foreign policy needs of the United States. This is primarily a function of the Congress, and the choice made is rationally based to serve these needs.

IV. THIS COURT HAS PREVIOUSLY HELD VALID A STATE COMPULSORY RETIREMENT SYSTEM AT AGE 50. *MASSACHUSETTS BOARD OF RETIREMENT* v. *MURGIA*, 427 U.S. 307 (1976).

This Court recently upheld a requirement that uniformed state police officers retire at age 50, rejecting the judgment of the district court in that case that mandatory retirement at that age denied appellee police officer the equal protection of the laws in violation of the Fourteenth Amendment. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). In so ruling, the Court specifically agreed "that rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection." *Id.* at 312.

Accordingly, the requirement for mandatory retirement of Foreign Service personnel at age 60 need only meet the test of rationality. The legislative history of the retirement program clearly shows that Congress was concerned about the ability of the Foreign Service to adequately meet its personnel staffing needs in order to best carry out its substantive responsibilities. As the Court recognized in *Murgia*, there is a relationship between advancing age and ability to perform on the job. *Id.* at 310-11. Since most persons will reach age 60 at the conclusion of a Foreign Service career, the law cannot be said to operate "to the peculiar disadvantage of a suspect class." *Id.* at 312.

The age classification is rational, in that it establishes an age beyond which, in the experience of the foreign affairs agencies, fewer employees can be expected to retain their competence to perform effectively in the representation of the interests of the United States abroad, and after which their continued retention in employment poses increasing problems in the administration of Foreign Service personnel. Such a classification may be less

than perfect, but it is reasonable. The holding in *Murgia* is controlling here.

CONCLUSION

For the foregoing reasons the decision of the district court should be reversed.

Respectfully submitted,

CATHERINE WAELDER
Attorney for the American
Foreign Service Association
as *Amicus Curiae*

July 20, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF NATIONAL COUNCIL OF SENIOR CITIZENS IN SUPPORT OF APPELLEES

Attorneys for the Amicus Curiae

HOWARD EGLIT
77 South Wacker Drive
Chicago, Ill. 60606
312-567-5037

MARK SHENFIELD
DAVID MARLIN
NATIONAL COUNCIL OF SENIOR CITIZENS, INC.
1511 K Street, N.W.
Washington, D.C. 20005
202-638-4351

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

CASES:

STATUTES:

MISCELLANEOUS:

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

---

AMICUS CURIAE BRIEF OF NATIONAL COUNCIL OF SENIOR CITIZENS IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

The National Council of Senior Citizens (NCSC) is an organization of more than 3,500 older persons' clubs, with a total membership of more than three-and-a-half million persons. It is incorporated as a non-profit organization in the District of Columbia.

A majority of its members are retired from fulltime employment. Others are close to retirement, either voluntary or mandatory. NCSC has a deep interest in governmental and private employer policies that provide opportunities for employment for older Americans.

NCSS has participated as amicus before this Court in other cases affecting older persons, including *Allied Chemical Workers* v. *Pittsburgh Plate Glass,* 404 U. S. 107 (1971) and *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1975).

The parties have agreed to the filing of this Brief. Their letters of consent are appended.

SUMMARY OF ARGUMENT

In *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1975), this Court held that the appropriate standard for judicial review under the equal protection clause to challenges of a classification based on age is whether the distinction rests on rational grounds. The district court below, carefully applying the record before it to this legal standard, properly held the Foreign Service mandatory retirement provision unconstitutional. The *Murgia* standard provides the basis for this Court to affirm.

A major rationale offered for the compulsory retirement provision here is that it enhances advancement opportunities for young Foreign Service employees. Even if the "make room for the young" argument had factual validity, which it does not, a policy to favor young workers at the expense of their older colleagues is inherently discriminatory and unjust.

Another justification for the mandatory retirement of Foreign Service personnel over 60 is that older employees presumptively lack the physical and intellectual vigor to competently perform their jobs. According to this hypothesis, prolonged exposure to the rigors of overseas employment gradually drains Foreign Service employees of their vitality. If this theory were valid,

however, it should be equally applicable to the tens of thousands of other government employees working abroad in jobs and circumstances substantially similar to Foreign Service personnel who are not subject to compulsory retirement at 60. It is patently unfair to single out only Foreign Service employees for early mandatory retirement.[1]

Nor does the record in this case support the government's assertion that Foreign Service employees lose their ability to effectively carry out their assignments upon reaching their sixtieth birthday. On the contrary, scientific data and uncontroverted evidence in the record establish the opposite. Based more on myths and stereotypes of older adults [2] than reality, the government's thesis is irrational and does not pass constitutional muster.

---

[1] There are of course other justifications occasionally offered for mandatory retirement. One is that employees—and employers—fear the trauma of an employee being told that he is no longer, on the basis of individual assessment, able to perform adequately. Thus, as economist Robert M. Macdonald writes:

> Almost all employers with a mandatory retirement policy stress that a central benefit to employees is removal of the fear of being judged incompetent. In this view, mandatory retirement is an essential component of a less harsh, less contentious system of personnel management which assists the employee to plan retirement, to retire without the stigma of having been found wanting, and hence to enter retirement with pride and sense of self-worth intact.

R. M. Macdonald, *Mandatory Retirement and the Law* 16-17 (1978).

Here, of course, with its regular selection-out procedure, the Foreign Service has no basis for suddenly invoking this rationale for those aged 60.

[2] See, *e.g.*, R. Butler, *Why Survive? Being Old in America* 6-16 (1975); Louis Harris and Associates, Inc., *The Myth and Reality of Aging in America* (1975); S. De Beauvoir, *Old Age* ch. 4 (1972).

ARGUMENT

I. A POLICY TO FAVOR YOUNG EMPLOYEES TO THE DETRIMENT OF THEIR OLDER COLLEAGUES IS INHERENTLY DISCRIMINATORY AND UNJUST.

The district court, in ruling for the plaintiffs, reasoned:

> [A]n interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme.
>
> 436 F. Supp. at 136.

That court read the Constitutional rightly.

The government continues to maintain the contrary position. Thus, in its brief filed in this Court, the government devotes considerable effort to the argument that room must be made for the young, and that the challenged law, retiring people at age 60, is an appropriate mechanism for achieving this proper end:

> [T]he mandatory retirement age creates "room at the top" so that there is a steady supply of promotion opportunities for the younger employees who must be promoted to stay in the service.
>
> Appellants' Brief, at 29.

Even if this Court upholds the law challenged here, it must reach its decision on grounds which abjure any such notion as that which is propounded by the government. For that position is nothing less than a concerted effort, albeit one dressed in handsome verbiage, to deploy invidious discrimination against a group simply because its members possess a characteristic—a certain number of years—over which they have no control whatsoever. This is an unacceptable infliction of deprivation: "legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

The make-room-for-the-young theme is, of course, a primary resort of proponents of age-based mandatory retirement. Invariably, they claim that forced ouster of older workers in no way demonstrates any antipathy towards these men and women; rather, involuntary retirement is a necessary method for absorbing the eager youngsters pressing on the labor market's doors and for opening up senior positions in hierarchical institutional structures.

Notwithstanding its considerable currency, the make-room-for-the-young argument is a bankrupt proposition. It fails on the facts, under the law, and in terms of simple justice.

A. The "Make Room For The Young" Argument Is Factually Invalid.

The factual flaws in the argument are numerous. First, it is erroneous to believe that retirement policies indeed open up any considerable number of jobs. Second, to the extent that job openings develop through the progressive movement out of senior employees, it is factually incorrect to believe that forced retirement is necessary to achieve this movement. And third, there is considerable inaccuracy in even contending that there is a sufficient number of young acolytes for whom room must be made.

The first and second factual errors merit joint analysis. A necessary predicate for contending that the old must be retired to make way for the young is the assumption that without forced ouster, the old will resistently hang on. Error abounds here. Rather than

workers seeking to stay on in their jobs, the consistent trend has been towards earlier and earlier voluntary retirement. For example, General Motors Corporation indicated that in 1976 only 2% of its retirees remained until the mandatory retirement age. "Mandatory Retirement: The Social and Human Cost of Enforced Idleness", Report by the Select Committee on Aging, U.S. House of Representatives, 95th Cong., 1st Sess., at 37-38 (1977).

Enterprises without any mandatory retirement report like figures. Bankers Life and Casualty Co., for example, has no compulsory retirement. In Congressional testimony, the Company asserted that the percentage of its work force 65 and over had not varied much over the last 20 years, and was, in 1977, 4% of the total. Hearing Before the Select Committee on Aging, U.S. House of Representatives, 95th Cong., 1st Sess., "Retirement Age Policies (Part I)", Testimony of Gerald L. Maguire, at 44 (1977).

The reality of work life is that most people leave their jobs before mandatory retirement would otherwise force them out. They do so for a number of reasons. Admittedly one of these is the simple recognition that they are soon going to be out anyway, given the looming imminent presence of the mandatory retirement age. But, in addition, there are significantly more important factors dictating early departure. For one, there is the common desire to simply stop working, after years of having done so. Other men and women, tired or bored with the jobs which they have held for numbers of years, seek other employment. Still other workers leave their positions because of ill health. And some die. Others seek a different climate, or greater

geographical proximity to their now-grown and departed children.

In sum, few workers stay on even until presently existing mandatory retirement ages. Indeed, the most extensive study yet done reveals that only 7% of all males aged 65 and over are able and willing to work, but are unable to find employment. Schulz, J., *The Economics of Aging* 61 (Belmont, Calif.: Wadsworth 1976). Assuming an annual outflow of 800,000 65-year-olds from the labor market each year, this means that a mere 56,000 men nationally are even potential reentrants into the job market This represents just .1 percent of the total labor force. Macdonald, R. M., *Mandatory Retirement and the Law* 22 (American Enterprise Institute for Public Policy Research 1978).

What is revealed by these figures is the fact that mandatory retirement is an unnecessary device for achieving job openings. Positions do open up as people move on, and virtually all of these positions would clearly continue to open up in a given enterprise if that enterprise abolished its mandatory retirement scheme.

There are other data, also, which further demonstrate how empty is the make-room-for-the-young argument. There is, for one, the disparity in qualifications between labor market departees and labor market entrants. "Of Americans now reaching retirement age, three out of four or more ended their education with junior high school or, at most, a year or two of senior high school." Drucker, "Flexible-Age Retirement", Industry Week 66, 67 (May 15, 1978). By contrast, the young people now entering the labor force have considerably more education. The consequence is that the jobs being vacated by older workers are the

ones which the younger entrants are simply not seeking.

Perhaps most trenchantly cutting against the demand for elders' ouster are some obvious demographic realities. We are, in fact, facing an imminent labor shortage. The "baby boom" of the '50's ultimately was supplanted by the "baby bust" of the '60's; the consequence is cogently delineated by Peter Drucker, in *The Unseen Revolution* 49-50 (1976):

> The American birthrate dropped between 1960 and 1964 by more than 25 percent and it has not yet turned up. With twenty as the age at which significant numbers of young people in today's America first become available for "real" jobs, the number of new entrants into the work force will begin to decrease sharply by the end of the seventies and will keep on going down at least until the 1980's. Whatever happens to the birthrate in the interim period can have impact only after 1995.
>
> For the mid-sixties until the mid-seventies, America each year had to find some 40 to 50 percent *more* jobs for young entrants into the working population than in any year between 1950 and 1965—the result of the "baby boom" between 1948 and 1959. From 1978 on, we will have each year up to 30 percent *fewer* entrants into the working population than we had in the ten years from 1967 to 1977.

The facts, then, do not sustain the make-room-for-the-young argument so often offered as justification for mandatory retirement. Even if mandatory retirement did not exist, there just would not be very many jobs in which people would stay on. Moreover, our problem for the future is not going to be too many people for too few jobs, but rather the reverse.

There is even deeper misconception embedded in the government's position here as well as, more generally, in the broad make-room-for-the-young argument. At base, the commitment to making room for younger workers depends upon an assumption: older people are on the mental decline. In other words, employers do not simply contend that they must hire young people because that is the nice thing to do, or that they must promote middle level people because that is the expected thing to do. They justify their hiring and promotion policies with the contention that what is needed are new blood, new ideas, agile intellects. By implication, the more senior workers are devoid of these characteristics. See Appellants' Brief, at 19.

Thus, an operative premises is that as a matter of functional ability, older people are intellectually deficient. Even if such a drastic misapprehension is abjured, proponents at the least must maintain that older people—or more accurately, people on the job a long time—are less receptive to, and/or less perceptive of, 'new' ideas. They may be intellectually adequate in terms of ability to think and to solve problems, but they simply are lacking because they have been around too long.

Both these postulates—that older people are intellectually deficient, and/or they are at the least incapable of absorbing and utilizing 'new' ideas—are of course unfounded and unwarranted. So far as functional ability is concerned, intelligence does not decline with age. See Section II-B, pp. 20-22, *infra*. And as for the notion that the young and inexperienced somehow wear a cloak of refreshing fervor, candor, naivete, or whatever, the very statement that callowness is an asset seems sufficient to rebut it. That is, unless this

Court is prepared to dispute the quality of work performed by Michaelangelo, Schweitzer, Churchill, Truman, Toscanini, Copland, and a host of other men and women, including, not incidentally, the very members of this Court. And see Appendix A, *infra.*

Amicus acknowledges that in certain settings the pressure for some assurance that slots will be available for promotions and hirings is particularly desirable The more closed a system, the greater the need for this assurance. Thus, the government may here have a claim which cuts with somewhat greater urgency than might be the case in a more fluid setting—an automobile factory, let us say, or even the federal civil service generally. Still and all, the government's position is an untenable one. As the Select Committee on Aging of the U.S. House of Representatives has said: "Economists agree that there is no 'lump of labor' which permits an as-one-goes-out-one-comes-in type of revolving door concept of employment." "Mandatory Retirement: The Social and Human Costs of Enforced Idleness", Report by the Select Committee on Aging, United States House of Representatives, 95th Cong., 1st Sess., at 38 (1977).

It might well be concluded, in fact, that the government position here is particularly lacking in merit, given the Foreign Service's rigorous selection-out system. As is explained in appellants' brief:

> Officers are ranked in "classes" and required to retire if they do not secure promotions within a specified number of years. The "selection-out" device is intended to "force attrition in a career service at a more rapid rate than is achieved by ordinary retirements" in order to guarantee "that Foreign Service officers shall be promoted by selection on the basis of merit."

Appellants' Brief, at 27.

Thus, the Foreign Service—unlike most other institutional entities in the federal establishment—has a working mechanism which takes the measure of performance, and removes from the Service those who do not perform up to par. Room is regularly made for the young; indeed, there is an institutionalized device—the selection-out process—for assuring that very constancy of movement which the proponents of the make-room-for-the-young argument espouse. If the realities of illness, boredom, desire to retire, etc., debunk the argument that mandatory retirement is needed to assure movement, the Foreign Service's selection-out process adds dramatic emphasis to the barrenness of the argument.

B. Preferential Treatment Of A Class Without A Showing Of Past Constitutional Deprivations Denies Equal Protection.

Mr. Justice Powell very recently stated a virtual truism of equal protection: "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *University of California Regents* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733, 2751 (1978). This statement was made in the context of a challenge to a racially-based preferential governmental program. Nonetheless, its message applies to all situations, including that here.

What is indeed operative in the present scheme is a preferential system, which singles out the young for

advantage. And this is done on the basis of just one criteria—age. As Justice Powell further stated in *Bakke,* 98 S.Ct. at 2752-53, "[T]here are serious problems of justice connected with the idea of preference itself." Indeed there are. And indeed the problems arising out of preferential treatment for the young are in a sense even greater than those associated with preferential admissions programs based on racial concerns.

The distinctive gap between this case, and other instances in which some preference for one group has been sanctioned, is that here there is a total absence of past violations, the necessary predicate for present preference. Indeed, as Mr. Justice Powell wrote in *Bakke:*

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. 98 S.Ct. at 2757-58.

Unlike minority racial group members who can point to a past history of discrimination as justification for present preferential treatment, the 'young' can point to no such history. Unlike women, who may claim—or have claimed for them—some special benefit, *Kahn* v. *Shevin,* 416 U.S. 351 (1974), the 'young' can identify no deprivations.

C. Ousting Older Employees To "Make Room For The Young" Is Unjust.

Ultimately, the plaintiffs' case need not rise or fall upon the acceptance, or rejection, of the arguments concerning the validity of the factual underpinnings

of mandatory retirement as serving the end of making room for the young. Nor, indeed, need the case law be an inescapable guide to final conclusion here. Without suggesting that either the factual issues or the legal analysis are irrelevant, amicus would urge that there is an even higher concern here—that of justice.

Justice is after all disserved by a system which discards able, older men and women simply because they are aged 60 and there are younger people waiting in line for their jobs.

We are not talking about some mere restructuring of economic circumstances when we speak of mandatory retirement. Employment obviously does play a very large role in a family's or an individual's financial security. But work serves other, enormously significant functions in addition to providing financial sustenance. For many, work is the very source of self-identification: it is a psychological mooring to which many of us are tightly bound. In sum, we are what we do:

> . . . Another aspect of our society of great importance in the consideration of retirement and employment in old age, and closely related to the accent on youth, is the importance it assigns to work. In our culture with its strong Puritan tradition, work has a unique value. It is the symbol of worth, success, and achievement. It confers status and prestige on the worker which he can acquire in no other way. It is the evidence of his acceptance by and contribution to society, and the source of most of his meaningful social contacts. Moreover, the wage received for a job attests to its value and itself becomes a symbol of social acceptance. Hence, unpaid work does not confer

> the prestige of a paid job and is not a satisfactory substitute for it. The lack of self-maintaining work in old age is therefore a symbol of social failure, a visible justification for the generally inferior social status accorded to the aged in our society.

Mathiasen, G. (ed.), *Criteria for Retirement* 66 (1953).

Take away his work—that source of psychological and ego sustenance—and the individual is seriously impaired. Indeed, the American Medical Association reports that involuntary loss of work can lead to both mental and physical debilitation. "Retirement—A Medical Philosophy and Approach", Committee on Aging, American Medical Association, at 1-3.

What the government here argues is that it is entirely appropriate to deprive an individual—an individual able to perform—of his job, at least so long as that deprivation is perpetrated in the name of benefitting others: the younger men and women in the hierarchical structure. This is a posture which flies in the face of our most basic notions of justice. For our society has regularly rejected as a suitable system one where legal burdens are imposed by the law unrelated to individual responsibility.

Granted, in light of *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1975), the standard to be applied in assessing the constitutionality of age-based classifications—conceivably even those extending a preference to the young—is that of rationality, a lesser test than that applied in the race area, and the gender area, *Califano* v. *Webster,* 430 U.S. 313 (1977). But in *Murgia,* there was an extensive record establishing both the extreme rigor of policing, and the correlation of physical failure, particularly in the cardiovascular system, with advancing age. Here, the record goes the other way, providing no basis for distinguishing 60-year-olds from 70-year-olds, Foreign Service officers from other federal employees engaged in equivalently rigorous—or mundane—employment.

Most important for the purposes of demonstrating *Murgia's* contrast with the instant case is the fact that there, Massachusetts' purpose was to "protect the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314. Here, older employees are deprived of employment, not because their proven susceptibility to a sudden physical disability endangers the public safety, but simply because they stand in the way of their younger ambitious colleagues.

Of course, we can all deplore an economy which lacks sufficient jobs for all. We can even accept, for the sake of argument, that mandatory retirement offers some sort of release valve, in some measure, from this situation. We cannot endorse as just, however, a system which economically and psychologically disenfranchises one group simply to advantage another.

II. THE COMPULSORY RETIREMENT OF FOREIGN SERVICE EMPLOYEES SOLELY BECAUSE THEY ATTAIN THE AGE OF SIXTY IS NOT RATIONALLY RELATED TO THE GOAL OF MAINTAINING A PHYSICALLY AND INTELLECTUALLY COMPETENT WORK FORCE

A second rationale advanced for the Foreign Service retirement statute is to ensure that its employees possess the physical and mental vitality necessary to properly perform their jobs. As a general rule, the government theorizes, it is reasonable to assume that the demands of overseas assignments will gradually take their toll on Foreign Service employees, rendering

them unfit to function effectively after their sixtieth birthday.

A governmental objective to employ competent individuals is, of course, a legitimate one. And it is understood that policies may be adopted to achieve that objective. But if the policies result in discriminatory conduct in which one group is injured while another is benefitted, the rationality of the policy must bear scrutiny. Here, neither the evidence in the record nor this Court's opinion in *Murgia* support the government's contention that mandatory retirement in this situation is fairly and substantially related to that goal.

A. The Challenged Statute Unfairly Singles Out Only Foreign Service Personnel For Early Mandatory Retirement

The theory that the rigors of overseas employment undermine the ability of those over sixty to competently perform their jobs is manifestly disproved by the experience of tens of thousands of government employees who work abroad without being subject to early mandatory retirement.[3] This fact clearly distinguishes the statute here at issue from the provision this Court upheld in *Murgia*.

There, Massachusetts law required uniformed state police officers to retire at age 50. Other law enforce-

[3] At the time this case was decided by the district court, most of these employees were subject to Civil Service mandatory retirement at age 70. 5 U.S.C. 8335(a). That provision has been repealed by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189. Most federal employees are as a result no longer subject to mandatory retirement at any age.

ment employees were not compelled to retire at such an early age. This disparity in treatment was justified, however, by the concededly unique role played by the uniformed branch:

> The sections do set a maximum retirement age for uniformed officers which is less than that set for other law enforcement personnel. It has never been seriously disputed, if at all, however, that the work of uniformed state officers is more demanding than that of other state, or even municipal law enforcement personnel. It is this difference in work demands that underlies the job classification.
>
> 427 U.S. at 315 n. 8.

The record in the case at bar reveals a wholly different situation. Weighing the evidence before it, the district court found as a factual matter that: (1) thousands of government employees not subject to mandatory retirement at 60 work abroad; (2) these employees face circumstances and perform jobs substantially similar to Foreign Service employees; and (3) there was no indication these employees serve overseas for significantly shorter periods of time than their Foreign Service counterparts. 436 F.Supp. at 136-38.

The only salient difference the district court could discern between the 4,787 Foreign Service personnel stationed abroad in 1976 and the approximately 53,000 other government employees [4] working beside them was that only the former were singled out for mandatory retirement at age 60. The lower court quite properly

[4] 436 F.Supp. at 136. The government indicates that in 1977, the number of American civilians working for the government abroad was about 100,000 (or 134,000 if those working in U.S. Trust Territories were counted). Appellants' Brief, at 24 n.26.

concluded "[t]his system is patently arbitrary and irrational." 436 F.Supp. at 139. Its decision should be affirmed on this narrow ground alone.

B. There Is No Significant Correlation Between Chronological Age And The Ability To Perform Foreign Service Jobs

Even were there some meaningful difference between Foreign Service personnel and other government employees working abroad, the statute requiring the former to retire at age 60 would still be constitutionally defective. As this Court made abundantly clear in *Murgia,* the mere incantation of a legitimate governmental objective is insufficient to justify an age-based discrimination. Rather, the classification must fairly and substantially further the purpose articulated by the legislature. See also *Gault* v. *Garrison,* 569 F. 2d 993 (7th Cir. 1977), *pet. for cert. filed,* 47 U.S.L.W. 3059 (April 24, 1978). Cf. *Houghton* v. *McDonnell Douglas Aircraft Corp.,* 533 F.2d 561 (8th Cir. 1977), *cert. denied,* 434 U.S. 966.

Thus, the *Murgia* Court did not end its inquiry once it ascertained the reason for Massachusetts' challenged retirement statute. Even though its objective "to protect the public by assuring physical preparedness of its uniformed police" (427 U.S. at 314) was unquestionably legitimate, the Court looked to whether the age classification reasonably promoted that important end—not by conjecture and hypothesis, but by a careful examination of the evidence and data in the record.

Through this process, the Court discovered that the work performed by uniformed police was uniquely arduous, requiring rigorous physical strength, agility and stamina. Reviewing the testimony of three physicians who testified at trial about "the psychological

and physiological demands involved in the performance of uniformed police functions [,] . . . the relationship between aging and the ability to perform under stress [, and] . . . aging and the ability to safely perform police functions", 427 U.S. at 311, the Court concluded that the evidence "clearly established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and the number of individuals in a given group incapable of performing stress functions increases with the age of the group." *Id.*

Thus, the statute at issue in *Murgia* was established —by specific empirical evidence—as bearing a substantial relationship to its purpose. The provision culled out older policemen, who by testimony were shown to be increasingly susceptible to physical impairments impeding their ability to perform the arduous work demanded by those charged with securing public safety.

In sharp contrast, the only objective evidence in the record concerning the relationship between age and the ability to perform the mostly white collar jobs held by Foreign Service personnel was introduced by appellees. This evidence refuted point by point the government's conclusory assumptions concerning the fitness of older adults to work overseas after reaching mandatory retirement age, and affirmatively demonstrated that Foreign Service employees between 60 and 70 are in no way unable to perform their roles as effectively as their younger colleagues.

The Government did not rebut this showing; it produced no probative evidence to support its theory that the rigors of working abroad inevitably take their toll on the physical and intellectual vigor of its employees.

Indeed, it could not. The experience of the social sciences runs counter to this assumption.

In Appendix A of this brief there is a partial list of noteworthy achievements accomplished by persons past the age of 69. These speak eloquently of the irrelevance of chronological age to productive capacity. The gerontological studies to date confirm this fact on a more mundane level.

The relationship between aging and ability to perform a job as measured in actual employment situations has been the subject of relatively few studies.[5] A

[5] Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1223, *Comparative Job Performance by Age: Large Plants in the Men's Footwear and Household Furniture Industries* (1957).

This study found a slight increase in productivity among older workers.

Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1273, *Comparative Job Performance by Age: Office Workers* (1960).

This study reported greater productivity by older workers.

Canadian Dept. of Labor, Economics and Research Branch, *Age Performance in Retail Trade* (1959).

This study found that older department store workers were equal to, or better than those younger, with peak performance at ages 51-55.

Clay, "A Study of Performance in Relation to Age at Two Printing Works" 11 Journal of Gerontology 417 (1956).

This researcher concluded that machine compositors and hand compositors showed a slight decline in productivity after age fifty, while older readers maintained a higher level of performance than younger ones until retirement.

Hakkinen, *Traffic Accidents and Driver Characteristics* (1958).

This study of Helsinki bus and tram drivers found no correlation between age and accidents.

Norman, "Professional Drivers and Road Safety" in *Proceedings of the Second Congress of the International Association for Accidents and Traffic Medicine* (1966).

Department of Labor study of office workers found that older workers perform as well as, or better than, younger employees.[6] Surveys of employers rating characteristics of older employees relative to younger employees found that older workers tend to be rated as equal or superior to those younger.[7] Those in positions to make hiring decisions believe that older workers are capable of continued work.[8] The results of these studies suggest that if any age group characteristic is significantly related to job performance, then experience is the most significant variable in predicting effectiveness.[9]

The available data also lends no support to the assumption that intellectual ability and "vigor" de-

This study of London bus drivers found the safest age range to be 60-64, with no significant decline for those older.

Palmer and Brownell, "Influence of Age on Employment Opportunities" 48 Monthly Labor Rev. 765 (1939).

These researchers found no correlation between age and output in surveying six New England companies.

Walker, "The Job Performance of Federal Mail Sorters by Age" 87 Monthly Labor Rev. 296 (1964).

This study of postal workers found a slight decrease, less than 10%, in performance after age 60.

[6] Dept. of Labor Bull. No. 1273, *Office Workers, supra.*

[7] Peterson, "Older Workers and Their Job Effectiveness" in *Gerontology* (C. B. Vedder, ed., 1963). This survey covered more than 3,000 older workers employed at 81 organizations.

[8] Louis Harris and Associates, Inc., *The Myth and Reality of Aging in America* 213 (1975): 52% of those with responsibility for personnel decisions agreed with this statement—"Most older people continue to perform as well on the job as they did when they were younger."

[9] A. Heron and S. Chowan, *Aging and the Semi-Skilled: A Survey in Manufacturing in Merryside, London* (1961).

cline with advancing age. It is a generally accepted proposition that chronological age is a highly unsatisfactory measure of occupational utility and adaptability. No objective evidence is available to support any generalized relationship between age and mental ability as measured by productivity, particularly where the nature of the work requires the significant utilization of intellectual capacity.[10] Using age as the sole index of intellective functioning ignores the fact that intelligence is not a unitary quality, and that some intelligences are not age related, while others vary with age in different ways.[11]

That there is no demonstrable relationship between Foreign Service mandatory retirement age and the physical or mental capacity to perform Foreign Service jobs renders the provision irrational. It is also wholly unnecessary. The Foreign Service already has in operation a mechanism fully capable of culling out unfit or incompetent employees—its selection-out process. See Appellants' Brief, 26-28.

In *Murgia,* there was no such reasonable alternative. The evil to be avoided was the risk of sudden physical incapacity, which might well endanger public safety. The empirical evidence demonstrated the likelihood of such an episode increased with age. Although "a number of detailed studies", 427 U.S. at 311, could help evaluate an individual's susceptibility to cardiovascular problems, their limited predictive ability (and cost) did not outweigh the potential dangers.

---

[10] Heron & Chowan, *supra* at n.9 pp. 6, 140; National Council on the Aging, *Utilization of Older Professional and Scientific Workers* 9 (1961).

[11] Botwinick, *Aging and Behavior* 196 (1973).

Here there is no public safety interest involved—the purpose of the Foreign Service retirement policy is not to avoid some future occurrence fraught with jeopardy to life and property. Rather, the provision is allegedly fashioned to weed out employees whose physical or intellectual vigor has slowly deteriorated over time, rendering them unfit for continued service. This gradual decay, if indeed it exists, would be easily detected by evaluating actual performance to determine whether ability or productivity has declined. This is precisely what the selection-out process measures. But unlike mandatory retirement, selection-out is closely tailored to its purpose. It culls out only those whose performance, for whatever reason, is not up to par—and on the basis of proven fact, not presumption.

Rationalizations for legislative line drawing cannot take the place of rational reasons. Admittedly, the equal protection clause does not require that statutory classifications be drawn with mathematical precision. The government's mandatory retirement scheme would not be constitutionally objectionable merely because a relatively few physically and intellectually fit Foreign Service employees were drawn into its web, so long as it generally served its purpose.

But that does not mean that lines can be drawn at random. The vice of the statute challenged here is precisely that it is left to conjecture and speculation whether it is promoting its articulated objective at all. Indeed, the fact that those subject to mandatory retirement are the "cream of the crop"—men and women who, on the basis of demonstrated merit, have survived the very competitive selection-out process—strongly indicates the provision "has the effect of excluding from service so few [Foreign Service] employees who are in

fact unqualified as to render age [60] a criterion wholly unrelated to the objective of the statute." *Murgia,* 427 U.S. at 316.

CONCLUSION

For the foregoing reasons, amicus National Council of Senior Citizens, Inc., urges this Court to affirm the decision of the court below.

Respectfully submitted,

Attorneys for the Amicus Curiae

HOWARD EGLIT
77 South Wacker Drive
Chicago, Ill. 60606
312-567-5037

MARK SHENFIELD
DAVID MARLIN
NATIONAL COUNCIL OF SENIOR CITIZENS, INC.
1511 K Street, N.W.
Washington, D.C. 20005

Sept. 22, 1978

APPENDIX

APPENDIX A

Accomplishments Past the Age of 69 (1975)

I. Architecture

Walter Gropius 1883-1969	Active member of The Architects Collective until death at 86; U.S. Embassy in Athens at 77.
Louis Kahn 1901-1974	Yale Mellon Center for British Studies at 71.
LeCorbusier (Charles-Edouard Jeanneret) 1887-1965	La Tourette Monastery at 73; Chandigark, India at 75.
Mies van der Rohe 1886-1969	Seagram Building at 70; National Gallery, Berlin 76-82.
Frank Lloyd Wright 1869-1969	Baghdad Opera at 88; Guggenheim Museum completed at 90.

II. Art

Giovanni Lorenzo Bernini 1598-1680	Ponte Sant'Angela; Tomb of Alexander VII; one of the designers of St. Peters; Altieri Chapel with death of the Blessed Ludovicia Albertoni.
Marc Chagall 1887-	Painter active into 80's.
Salvador Dali 1904-	Surrealist still active at 71.
Marcel Duchamp 1887-1968	Painter active until death at 81.
Max Ernst 1891-	Painter active into 80's.
Vasili Kandinski 1866-1944	Russian post-impressionist painter who founded new abstract school with Paul Klee; active until his death at age 78.
Michelangelo 1475-1564	Greatest works up to time of death at 89.

Joan Miro 1893-	Painter, sculptor, still active at 78.
Grandma Moses (Anna Moses) 1860-1961	Began to paint at 72.
Pablo Picasso 1881-1973	Still active past 90.
David Siquieros 1896-1974	Mexican muralist active until death at 78; "March of Humanity" (50,000 sq. ft. mural) executed in 70's.
Edward Steichen 1879-1973	Photographer, Director Emeritus of Department of Photography, Museum of Modern Art; edited *The Family of Man* at 76; one man exhibit at MOMA at 82.
Tintoretto (Jacopo Robusti) 1518-1594	Worked until death at 81.
Titian 1477-1576	Portraits of Pope Paul III; completed Pieta immediately before death at 99.

III. Business and Labor

Bernard Baruch 1870-1965	73 when wrote report on post-war conversion of American economy; appointed to U.N. Atomic Energy Committee at 76.
Harry Bridges 1900-	Labor leader, still active at age 75.
Cyrus Stephen Eaton 1883-	Published: Is the Globe Big Enough for Capitalism and Communism? at 75; Canada's Choice at 76; The Engineer As Philosopher at 78; holds nine directorships; Trustee, Denison University; University of Chicago.
Alfred Fuller 1885-1973	Chairman of Board of Fuller Brush Co. at 83.
Cary Grant 1904-	Head of Faberge Perfumes at 71.
John L. Lewis 1880-1969	President of United Mine Workers of America from age 40 to 80.

George Meany 1894-	President of AFL-CIO at 81.
Bill Rickets	Present Chairman of Chappel's, the international music firm, age 90.
Col. Sanders (fried chicken)	Started at 66; now 82.

IV. Cinema

Luis Buñuel 1900-	Director, still active at 75; directed Tristana at 70; The Petit Charm of the Bourgeoise at 72; The Phantom of Liberty at 74.
Charlie Chaplin 1889-	Published My Autobiography at 75; wrote and directed "A Countess From Hong Kong" at 78.
Vittorio de Sica 1902-1974	Directed *Garden of Finzi-Continis* at 70; *Brief Vacation* at 71.
Alfred Hitchcock 1899-	Motion pictures and television producer; still active at 76; *Frenzy* at 73.
Jean Renoir 1894-	Directed C'est La Revolution at 73; La Petit Theâtre de Jean Renoir at 77.

V. Education

William Benton 1900-1973	Publisher of 15th Edition of Encyclopedia Britannica at 73.
James Bryant Conant 1893-	Thomas Jefferson and the Development of American Public Education at 69; The Education of American Teachers at 70; Two Modes of Thought at 71; Shaping Educational Policy at 71; The Comprehensive High School at 74; My Several Lives—Memoirs of a Social Inventor at 72.
Sir Alan Gilbert	Continues to teach (Drew University) at 82; since retirement at 69, has written, translated or edited six books and published 17 scholarly articles.
Noah Webster 1758-1843	Published American Dictionary of English Language at 70; published a revision of the Authorized Version of the English Bible at 75.

René Wellek 1903-	Working on 5th volume of History of Modern Criticism at 72.

VI. Fiction and Poetry

Melville Cane 1879-	At 92, a practicing lawyer; commissioned to write commemorative poem for Phi Beta Kappa's bicentennial in 1976; author of Make a Poem at 74; And Pastures New at 77; Bullet-Hunting at 81; To Build A Fire at 85; So that It Flower at 87; All and Sundry, autobiography published at 89; co-editor The Man From Main Street, at 74; The Golden Year at 81.
Agatha Christie 1890-	Mystery writer, active at age 85, 14 novels after age 69.
Jean Cocteau 1891-1963	Writer, poet.
Noel Coward 1899-1973	Playwright.
T. S. Eliot 1888-1965	On Poetry and Poets at 69; The Elder Statesman at 70; Collected Poems (1909-62) published at 75.
Robert Frost 1874-1963	From age 69-75, Ticknor Fellow in Humanities at Dartmouth; Ambassador of Good Will to South America at 80, Israel and Greece at 87, Russia at 88; Congressional Gold Medal at 88; represented the Arts at John F. Kennedy's inauguration at 87; wrote a Masque of Reason at 71; Steeple Bush at 73; A Masque of Mercy at 73; In the Clearing at 87.
Johann Wolfgang von Goethe 1749-1832	Second part of Faust completed at 82.
Pär Lagerkvist 1891-1974	Pilgrim at Sea at 71; Marianne at 78.
Melchior Lengyel	Playwright, still active at age 92.
Marianne Moore 1887-1972	Poet, active until death at age 85.

Vladimir Nabokov 1899-	Novelist still active at 76; *Ada* at 70; *Glory* at 72.
Ezra Pound 1885-1972	Latest installment of the Cantos at 74; Sophoclean Translation, The Woman of Trachis at 71; Translation of the Classic Anthology Defined by Confucius at 69.
George Ryaal (Audax Minor)	Writes a weekly column on horse racing for the New Yorker at age 80.
Rex Stout 1886-	Writer of mystery novels, 91.
Mark Twain (Samuel Clemens) 1835-1910	Active until death at 75; What is Man?, Eve's Diary at 71.
Thornton Wilder 1897-	Novelist & Playwright; The Eighth Day at 70; Theosophilus North at 76.
Walt Whitman 1819-1892	Good-bye, My Fancy at 70.
P. G. Wodehouse	Author of 23 novels after age 69.

VII. Government and Heads of State

Konrad Adenauer 1876-1967	Chancellor of West Germany, 73-87.
King Gustaf VI Adolf 1882-1973	Ruler of Sweden until 91.
David Ben-Gurion 1886-1973	Prime Minister and Minister of Defense from Israel's formation at 62 to 77; Member of Knesset from 77 to 79.
Sir Alexander Bustamante 1884-	Prime Minister at 78; active politically at 91.
Winston Churchill 1874-1965	Leader of wartime government at 71.
Georges Clemenceau 1841-1929	Prime Minister of France during World War I at 76.
Chiang Kai-Chek 1887-1975	Head of Nationalist Chinese Government on Formosa until 88.
Chou En Lai 1898-	Premier of China at 77.

Charles De Gaulle 1890-1970	President of France for over 20 years until age 79.
Sam Ervin 1896-	Chaired Senate Watergate Committee at 76.
Francisco Franco 1892-	Spanish head of state at 83.
Benjamin Franklin 1706-1790	Delegate to Second Continental Congress in 69th year; one of five drafters of Declaration of Independence at 70; afterwards Ambassador to France until 79; attended Constitutional Convention of 1787 at 81.
Gandhi 1869-1948	✓Arrested at age 73 as leader of Indian Independence Movement; active till death at 79.
Malana Hamid	Bangladesh opposition leader at age 90.
Paul Hoffmann 1891-1974	U.N. administrator; managing director of U.N. Special Fund till 75; of U.N. Development Program till 83.
Ismet Inonu 1884-1973	Re-elected prime minister of Turkey at 77, served to 81; leader of opposition party until 88.
Jomo Kenyatta 1893-	President of Kenya from age 70, now 82.
Jawaharlal Nehru 1889-1964	Prime minister of India until death at 75.
Pope Paul VI 1897-	Elected at 66, now 78.
Sarvepalli Radhakrishnan 1885-1975	President of India until 79.
Samuel Rayburn 1882-1961	Speaker of the House at 78.
Eisaku Sato 1901-	Prime Minister of Japan at 70; President of Liberal Democratic Party at 73.
Emperor Haile Selassie 1891-1975	Ruler of Ethiopia until deposed at 83.

Marshall Jossip Broz Tito 1892-	President of Yugoslavia at 83.
Mao Tse-Tung 1893-	Chairman People's Republic of China at 82.
Eamon de Valera 1882-1975	President of Ireland until age 91.
Walter Ulbricht 1893-1973	Chairman of DDR Communist Party until 78.

VIII. Presidents of the United States

James Buchanan 1791-1868	Inaugurated at 65; 69 at end of term.
Dwight Eisenhower 1890-1969	Inaugurated at 62; 70 at end of term.
Andrew Jackson 1767-1847	Inaugurated at 61; 70 at end of term.
Harry S. Truman 1884-1973	33rd President; 69 at end of term; active until 89.

IX. Historians and Political Theorists

W.E.B. DuBois 1868-1963	Professor at Atlanta University until 76; Founder of Phylon magazine at 72; politically active until death at 95; *Dusk at Dawn* at 72.
Will Durant 1885-	The Story of Civilization: Vol. VI, The Reformation at 72; Vol. VII, The Age of Reason Begins (with Ariel Durant) at 76; Vol. VIII, The Age of Louis XIV (with A. Durant) at 78; Vol. IX, The Age of Voltaire (with A. Durant) at 80; Vol. X, Rousseau and Revolution (with A. Durant) at 82; The Lessons of History (with A. Durant) at 83; Interpretations of Life (with A. Durant) at 85; History of the Revolutionary Years 1640-1660.
Thomas Hobbes 1588-1679	Continued writing and publishing until death at 91.
Alexander Kerensky 1881-1970	Provisional Government of 1917 In Documents--3 volumes at 80; Russia and History's Turning Point at 84.

Samuel Eliot Morison 1887-	Eminent American historian; **14 books** after age 69, including Pulitzer Prize; *The European Discovery of America: The Southern Voyages* at 87.

X. Journalists

Arthur Krock 1886-1974	Journalist, retired from Times Washington Bureau at 80; 4th Pulitzer at age 89.
Walter Lippmann 1889-1974	Pulitzer prizes at 69 and 73; Overseas Press Club Award; active daily columnist until age 78, and occasional contributor to Newsweek until 82.

XI. Law

A. *Judges*

Tanaka Kotaro 1890-1974	Chief Judge, Japanese Supreme Court to age 70; served on International Court of Justice in The Hague, ages 71-79.

Chief Justices of Supreme Court

Melville Fuller 1888-1910	Age at installation, 65; age at end of term, 77.
Charles E. Hughes 1862-1948	Age at installation, 63; age at end of term, 79.
John Marshall 1755-1835	Age at installation, 46; age at end of term, 80.
Harlan Stone 1872-1946	Age at installation, 69; age at end of term, 74.
William H. Taft 1857-1930	Age at installation, 64; age at end of term, 73.
Roger Taney 1777-1864	Age at installation, 59; age at end of term, 87.
Morrison Waite 1816-1888	Age at installation, 58; age at end of term, 72.
Earl Warren 1891-1974	Age at installation, 62; age at end of term, 78.
Edward White 1845-1921	Age at installation, 65; age at end of term, 76.

Present Supreme Court

William O. Douglas 1898-	Age at installation, 41; now age 77.

Judges

Hugo Black 1886-1971	Age at installation, 51; age at end of term, 85.
Louis Dembitz Brandeis 1856-1941	Age at installation, 60; age at end of term, 83.
Learned Hand	On the bench until 79.
John Marshall Harlan 1899-1971	Age at installation, 41; age at end of term, 71.
Oliver Wendell Holmes 1841-1935	Age at installation, 61; age at end of term, 91.
Judge Harold Medina 1888-	Senior Judge in the Second Circuit at 83.

As of 1975, 47 Senior Circuit Court Judges and 102 Senior District Court Judges active in Federal Judiciary.

B. *Lawyers*

Herman Arthur Fischer	Chairman of the Board, Gary-Wheaton Bank from age 70 to age 84; active in law practice at age 90.
Sam Markewich 1882-	Practicing lawyer at the age of 87.

C. *Professors*

Paul E. Basye (Hastings) 1901-	At 69, 2nd edition Clearing Land Titles.
William Wirt Blume (Hastings) 1893-	At 70, aid in preparation of Michigan Civil Procedure; two extensive articles, Hastings Law Journal at 73 and 77.
Jerome Hall (Hastings) 1901-	"Archives for Philosophy of Law and Social Philosophy" at 69; "Legal Thought in the U. S. A. under Contemporary Pressures"; "Justice in the 20th Century", soon to be published; "Jurisprudential Theories and the

	Effectiveness of the Law", to be published in *Nomos;* will present paper to American Society for Political and Legal Philosophy at annual meeting.
Frederick Kessler 1901-	Educator and law professor.
Norman D. Lattin (Hastings) 1894-	Recently, new edition of text on *Corporations.*
Frederick J. Moreau (Hastings) 1893-	*After Age 70:* Two large supplements to two-volume work which appeared initially in 1957; two surveys of California Law, 140 pages total; just agreed to do 3rd supplement to above.
George E. Osborne (Hastings) 1893-	2nd edition of text on *Mortgages* at 77; *Cases on Suretyship* at 73; *Cases on Secured Transactions* at 74.
Rollin M. Perkins (Hastings) 1889-	Cases on Criminal Law and Procedure (3rd ed.) at 77; Perkins on Criminal Law (2nd ed.) at 80; "The Vagrancy Concept", 9 Hast. L. J. 237 at 69; "Collateral Estoppel in Criminal Cases", at 71, at U. of Ill. L. J. 533; "Analysis of Assault and Attempts to Assault", 47 Minn. L. R. 71 at 73; "Corpus Delecti of Murder," 48 Va. L. R. 173 at 73; "Alignment of Sanction with Culpabl Conduct", 49 Ia. L. R. 325 at 75; "Some Weak Points in the Model Penal Code", 17 Hast. L. J. 3 at 76; *Book Reviews:* Glueck: Roscoe Pound and Criminal Justice, 11 N. Y. Law Forum 725 at 77; Packer: Limits of the Criminal Sanction, 15 N. Y. Forum 442 at 79.
Roscoe Pound	Professor at Harvard Law School from 66 to 77; after age 77, active in numerous legal, editorial and educational positions, including a reorganization of the Nationalist Chinese Judicial System.

Richard R. Powell (Hastings) 1890-	*Books:* Abridgement of Treatise on Real Property (with P. J. Rohan) at 78; Wills and Trusts (preliminary edition of Columbia and Michigan—3 installments—1959, at 69; Truncated Readings in the Law of Future Interests for California, 1 vol., 1962, at 72; *Articles:* "Perpetuities in Arizona", Ariz. L. R. 225 (1959) at 69; "Perpetuities", Encyclopedia Britannica (1959) at 69; "Relation Between Property Rights and Civil Rights", 15 Hast. L. J. 135; "Race and Property", Diablo Press, 1964 at 71; "New Powers of Appointment Act", 103 Tr. & Est. 807 (1964) at 74; "Rac. Dis. in Housing in Cal.", 18 Va. L. R. W. (1965) at 75; "Alaskan Earthquake of 1964", 18 Hast. L. J. 365 (1967); "Freedom of Alienation—For Whom", 2 Real Orio, Oribate & Trust J., 127 (1967) at 77; "Powers of Appointment in Cal.", 19 Hast. L. J. 1281 (1968) at 78; "Elliot E. Cheatham—Gentleman", 22 Vand. L. J. 16 at 78; "Law and Its Impact on the Family (for Law wives of Hastings) at 78; "The Growth of the Law" (ed.), at 80; "How Free Is It Socially Desirable . . . ", Record, Assn. of Bar, City of New York at 81. *In addition:* 24 addresses given since 1960 (since age 70); *Book Reviews:* Scott Abr. 46 Corn. L. Q. 375 at 71; Dietz, In Defense of Property, 17 Stan. L. R. 779 at 75; Anderson, Amer. Law of Zoning (4 vols.), 20 Hast. L. J. 1163 at 79; *Three studies* made for New York Law Revision Commission at 72, at pp. 487-99, 515-20, 603-04; *Study* for Cal. Law Revision Commission at 77; "Powers of Appointment, With Proposed Draft Statute."
William L. Prosser (Hastings) 1898-1974	*After age 70:* 3rd edition of text on *Torts;* Reporter of new *Torts Restatement.*

Lewis M. Simes (Hastings) 1889-	Improvement of Conveyancing by Legislation at 71 (with C. E. Taylor); Model Title Standards at 71 (with C. E. Taylor); Handbook for More Efficient Conveyancing at 72; 2nd ed. Handbook of Future Interests at 77; "Perpetuities in California Since 1951" (Hast. L. J. 1967) at 78.
Roscoe T. Steffen (Hastings) 1893-	"The Private Placement Exemption", 30 U. Chi. L. R. 211 at 70; Cases on Commercial and Invesement Paper, 3rd ed. at 71; "Enterprise Liability: Some Exploratory Comments", 17 Hast. L. J. 165 at 72; "Private Placements Should Be Registered", 43 N. C. L. R. 548 at 72; Cases on Agency-Partnership, 3rd ed., at 76.
Clarence M. Updegraf	At 73, Article, 17 Hast. L. J. 473; at 77, 3rd ed. of Arbitration and Labor Relations; published, at 78, book review of Labor Relations Between Public Employees and Employers (Sullivan).
Harold E. Verbal (Hastings) 1902-	At 69, new edition of book on Community Property.

XII. Music and Dance

George Balanchine 1904-	Director and chief choreographer of New York City Ballet at 71.
Karl Boehm 1894-	Conductor, still active at 81.
Nadia Boulanger 1887-	Still active teaching musical composition at 88.
Pablo Cassals 1876-1973	Active past the age of 90.
Rudolf Friml 1879-	Active as composer and pianist past 90.
Martha Graham 1894-	Active as choreographer at 81; active as dancer until 78.
Franz Joseph Haydn 1732-1809	Composer, active until his death at age 77.

Otto Klemperer 1885-1973	Active as conductor until age 87.
Joseph Krips 1896-1974	Conductor, active at age 76.
Jean Philippe Ramean 1683-1764	Last great operas from age 74-77.
Artur Rubenstein 1889-	Pianist still active at 86.
Charles Camile Saint-Saens 1835-1921	Wrote a number of operas from age 69-76; a series of works for wind instruments and piano from 80 to 86.
Leopold Stokowski	Conductor of the American Symphony Orchestra at age 90.
Robert Stoltz	Composer, active at age 91.
Igor Stravinsky 1882-1971	Composer, active until his death at age 88.
Georg Phillipp Telemann 1681-1767	Finest musical works when over 80.
Arturo Toscanini 1867-1957	Conducted until age 87.
Giuseppe Verdi 1813-1901	Opera composer, completed Otello at 72, Falstaff at age 80.

XIII. Philosophy

Henri Bergson 1859-1941	Deux Sources de la Morale et da la Religion at 71; La Pensee et le Mouvant at 73.
Brand Blanchard 1892-	Educator and Philosopher; at 70 visiting prof. at U. of Minn. and pub. Reason & Analysis.
Franz Brentano 1838-1917	Aristoteles Lehre vom Ursprung at 73; Kategorienlehre from 73-76; Versuch uber die Erkenntnis until death.
Ernst Cassirer 1874-1948	"Essay on Man" at 70; Myth of the State at 71 (died at 71).

John Dewey 1859-1952	Common Faith at 75; Logic, The Theory of Inquiry at 79.
Charles Hartshorne 1897-	Educator and Philosopher.
Martin Heidegger 1889-	Unterweis zur Sprache at 70; Nietzsche at 72; Die Frage Nach Dem Ding at 73; Kants These Uber das Sein at 74; Die Technik und die Kehre at 74.
William E. Hocking 1873-1966	Meaning of Immortality in Human Experience at 84.
Immanuel Kant 1724-1804	Religion within the Limits of Reason Alone at 69; Eternal Peace at 71; from 71-80, six works at 816 total pages.
Horace Meyer Kallen 1882-	Educator and Philosopher. Distinguished Seminar Professor at Long Island University from age 82 to 86; *Published:* Secularism is the Will of God, at 72; Cultural Pluralism and the American Idea, at 74; Utopians at Bay, 76; The Book of Job as Greek Tragedy, at 77; A Study of Liberty, at 77; Philosophical Issues in Adult Education, at 80; Freedom, Tragedy, and Comedy, at 81; Laughter and Tears, at 86.
C. I. Lewis 1883-1964	The Ground and Nature of the Right at 71; Our Social Inheritance at 72; working on manuscript at time of death at 81.
Jacques Maritain 1882-1973	Professor of Philosophy at Princeton from 66 to 73; Man and the State at 69; Creative Intuition in Art and Poetry at 71; La Philosophie Morale: examen historique et critique des grand systemes at 78; English Translation—The Person and the Common Good at 84.
Stephen C. Pepper 1891-	Concept and Quality at 76.

Ralph Barton Perry 1876-1957	Realms of Value at 78.
Thomas Reid 1710-1796	Essays on the Active Powers of Man at 78; Essays on the Intellectual Power of Man at 75.
Bertrand Russell 1872-1970	Nobel Prize for Literature, 1950 at 78.
George Santayana 1863-1952	Realms of Being at 77; Persons and Places at 80; Last Puritan at 72.
Ashbel Smith	Professor of Philosophy at the University of Texas for the past six years and continues in this capacity at the age of 73; published A Natural Theology for Our Time at 70; also has authored numerous articles in professional journals after passing the age of 70.
Herbert Spencer 1820-1903	Synthetic Philosophy (10 vols.) finished at 76.
James Ward 1843-1925	Essays in Philosophy at 82.
Paul Weiss 1901-	Educator and Philosopher; Philosophy in Process 6 Volumes (1968-75); Making of Men, 68; Cinematics, 73; Beyond All Appearances, 72; Sports: A Philosophical Inquiry, 71; Hofstra Distinguished Scholar Medal, 72; Fellow Ezra Stiles College; Heffer Prof. Philosophy Catholic U. of America, 1969-

XIV. Psychology

Sigmund Freud 1856-1939	Das Unbehagen an der Kultur at 74; New Series of Vorlesungen zur Einfuhrung in die Psychoanalyse at 76; Moses, Sein Volk und die Monotheistische Religion at 82.
Carl Jung 1875-1961	Appointed Professor of Medical Psychology at University of Basel at 68.

XV. Religion

Augustine 354-430	The City of God, between 59-72.
Martin Buber 1878-1965	Paths in Utopia at 69; Between Man and Man at 69; Hasidism and the Way of Man at 70; Two Types of Faith at 73; Images of Good and Evil at 74; Elija: ein myster enspiel at 85.
Paul Tillich 1886-	Professor at Harvard Univ. from 69-76; Professor at Univ. of Chicago from 76 to death at 79; 3 vols. Systematic Theology, age 65-77; The New Being at 69; The Eternal Now at 77.

XVI. Sports

George Halas 1895-	Coach of Chicago Bears until 72; President of NFC at 75; still active as Chicago Bears' Chairman of the Board at 80.
Adolph Rupp 1901-	Coach of U. of Ky. basketball until age 71; retired to become President of ABA Memphis Tams.
Casey Stengel 1889-	World championship and Manager of Year at 69; pennant winner at 71; charismatic leader of Mets until 76.

No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

---

AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF APPELLEES

L. M. PELLERZI
General Counsel
American Federation of Government Employees (AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
Of Counsel

WILLIAM J. MAHANNAH
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

MARY E. JACKSTEIT
1776 Pennsylvania Ave., N.W.
Room 164
Washington, D.C. 20006
Attorneys for American Federation of Government Employees (AFL-CIO)

September 22, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

INDEX OF CITATIONS

INDEX OF CITATIONS—Continued

INDEX OF CITATIONS—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

---

AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF APPELLEES

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the American Federation of Government Employees files this Brief as *amicus curiae* in support of the Appellees.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees ("AFGE") is an unincorporated association and labor union representing approximately 700,000 civilian employees of the federal government. These employees work in every major department and agency, and are assigned throughout the world. Within the foreign affairs agencies, AFGE holds exclusive recognition for approximately 2200 Foreign Service employees of the International Communication Agency (ICA), formerly the United States Information Agency (USIA); for all Civil Service and Wage Grade employees of the ICA and the Agency for International Development; and for a significant proportion of the Civil Service and Wage Grade employees of the Department of State.

In its capacity as exclusive bargaining representative for members of the Foreign Service, AFGE negotiates personnel policies, presents grievances and carries on legislative activity to improve the welfare of employees and their ability to carry out the foreign policy objectives of the United States. Therefore, AFGE is keenly interested in the elimination of a discriminatory element of the Foreign Service system which arbitrarily excludes certain employees from service in the federal government: mandatory retirement at age sixty.

SUMMARY OF ARGUMENT

A statutory discrimination exists between Foreign Service employees and other federal employees with regard to the age at which retirement may be compelled. The district court found this discrimination to be without a rational basis and therefore in violation of the equal protection guarantees of the Fifth Amendment of the Constitution. The Government has failed to provide a

basis for reversing this finding and, indeed, has only repeated earlier unsupported statements and opinions that the nature of Foreign Service work requires an earlier mandatory retirement age. Such an unsubstantiated presentation is insufficient where, as here, the record solidly contradicts the unsupported statements and opinions. The district court properly examined the record to determine whether a factual basis exists to support mandatory retirement at age sixty as a means to ensure a high degree of competence in the Foreign Service. The court found the record to overwhelmingly rebut any contention that the stresses and conditions of Foreign Service employment require an earlier mandatory retirement age for Foreign Service employees.

The record establishes that Foreign Service employees over age sixty are no less able to serve in overseas assignments than those under sixty, and are no less able to perform than the other federal employees who serve abroad. It is obvious that the attributes necessary for competent performance in the Foreign Service are of an intellectual and psychological nature and are not of the type that naturally diminish by the age of sixty. The Government has not shown that overseas Foreign Service work is likely to become unmanageable for, or have a particular debilitating effect upon, employees who reach age sixty.

Furthermore, mandatory retirement at age sixty is not an essential element of the Foreign Service personnel system which is designed to achieve a high level of competence. The operation of the system would not be impeded in any way by eliminating this retirement age provision; the promotion and selection procedures based solely on performance would be unaffected. Any alleged reduction in the number of promotion opportunities in the Foreign Service is unrelated to the existence or nonexistence of mandatory retirement at age sixty.

The fact that the elimination of age sixty mandatory retirement could increase the number of employees competing for career opportunities is not a rational basis for the lower mandatory retirement age applicable to the Foreign Service. Enhancement of opportunities for younger employees at the expense of opportunities for older employees is not a legitimate governmental purpose, and is discrimination *per se* where, as here, no nexus has been established between diminished performance ability and age. Because the discrimination between Foreign Service employees and other federal employees with regard to a mandatory retirement age fails to rationally further a legitimate governmental purpose, the discrimination has no rational basis and is unconstitutional. The decision of the district court is correct and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND UPON REVIEW OF THE RECORD THAT NO RATIONAL BASIS EXISTS FOR THE DISCRIMINATION BETWEEN FOREIGN SERVICE PERSONNEL AND OTHER FEDERAL EMPLOYEES WITH REGARD TO MANDATORY RETIREMENT AGE.

The district court in this case found as a matter of fact on the basis of the record that no rational basis exists for requiring Foreign Service employees to retire at age sixty. (J.S. App. 1A-8A) The record which the court had before it "conclusively establishe[d]" (J.S. App. 5A) that other federal employees serve in difficult conditions abroad, and "convincingly" showed (J.S. App. 6A) that reaching age sixty is no bar to effective performance in government employment overseas. Absent from the record was a factual showing by the Government to counter the plaintiffs' evidence in this regard. The district court's conclusion that the age sixty mandatory retirement provision is irrational and arbitrary was therefore entirely

proper. The Government, as Appellant, has provided no basis for disturbing this conclusion and has only repeated statements and opinions for which it has provided no foundation.

It is plain that Congress may create classifications of people and accord different treatment to the different classes. However, when a statutory classification encounters an equal protection challenge the inquiry goes beyond simply whether a classification has been drawn to ask whether the classification bears a rational relationship to a legitimate state purpose. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). The classification must be based upon some reasonable ground. *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-9 (1966). Thus, to say that Congress has established a Foreign Service and a Civil Service differing in various ways, is not to conclude that any differential treatment between Foreign Service employees and Civil Service employees is constitutional. A differential treatment must be shown to be reasonably related to the purpose of the statute which has imposed it. *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

The Government has asserted that the legitimate purpose served by requiring Foreign Service employees to retire at age sixty is that of "maintaining a competent and professional diplomatic corps." (Brief for Appellant at 9). This is certainly a laudatory objective. However, the Government must go beyond merely articulating its purpose to establish by the record the manner in which it is "rationally furthered" by the age sixty mandatory retirement provision. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).[1] In *Murgia*, this

[1] That judicial inquiry is to be made into the relation between a legislative purpose and the means chosen to achieve that purpose seems clear. In the case of *Trimble* v. *Gordon*, —— U.S. ——, 97 S. Ct. 1459 (1977), this Court found a constitutional analysis to be "incomplete" (at 1464) which did not address the relation between the challenged statute and the asserted governmental interest. *See*

Court examined the record for the factual basis supporting a mandatory retirement provision for uniformed police officers. Note was taken of the findings of a special legislative commission that there existed a perceptible diminution by age fifty-five in the physical strength required for uniformed police work. Attention was given to the testimony of expert witnesses on the effect of the physically demanding work and continued ability to perform. By examining the record, the Court agreed that uniformed police work is physically strenuous and that strength as well as stamina decrease with age. Thus, the Court reached the conclusion that the provision for mandatory retirement at age fifty-five rationally furthered the State's purpose. That the evidence and the actual circumstances of uniformed police work were examined demonstrates that the Court's conclusion was not based upon bare statements either of the legislature or of the Board of Retirement.[2] It illustrates that even under the rational basis test there is "bite in the Equal Protection Clause".[3]

---

also, Eisenstadt v. *Baird*, 405 U.S. 438, 447 (1972); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1973); *Reed* v. *Reed*, 404 U.S. 71, 75-6 (1971).

[2] That the decision in *Murgia* was based on evidence in the record was the conclusion of the Seventh Circuit in *Gault* v. *Garrison*, 569 F.2d 993, 995-6 (1977). In that case the court examined and distinguished the situation of teachers from that of uniformed police finding "mental skills" more important than "physical ability." (at 996) The court also found no "life and death" factor should a teacher become unable to function properly, as might exist with a police officer.

[3] Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-19 (1972).

II. THE RECORD FAILS TO ESTABLISH THAT FOREIGN SERVICE EMPLOYEES OVER AGE SIXTY ARE LESS ABLE TO PERFORM COMPETENTLY AND PROFESSIONALLY THAN THOSE UNDER SIXTY OR THAN OTHER FEDERAL EMPLOYEES OVER AGE SIXTY WHO SERVE ABROAD.

The Government has asserted that the stresses and conditions of overseas Foreign Service life diminish the ability to work past age sixty so as to justify a mandatory retirement age lower than that which applies to other federal employees. It has failed, however, to build a record which supports this assertion. While relying on *Murgia*, *supra*, the Government has not even approached the kind of factual showing that was made by Massachusetts in that case. It cannot suggest that Foreign Service work is physically strenuous, involves protection of the public, or requires that employees carry weapons to subdue dangerous persons. Obviously, Foreign Service employment is of a different character. The attributes critical to good performance are adaptability, sensitivity to other cultures, intelligence, mature judgement, and the ability to synthesize and communicate ideas. These are characteristics which, the record establishes, have no correlation with youth; they are not attributes likely to diminish after one reaches age sixty. The affidavits introduced below by the plaintiffs, reveal that older people adapt as well to overseas life as younger ones, and are no more likely to contract debilitating diseases or to suffer medical problems.[4] They suggest that some of these factors are actually more of a problem for young inexperienced employees with small children.[5] The affidavits also reflect that intelligence and good judgement

---

[4] English Aff. para. 3 (R-42); Munzer Aff. para. 2 (R-33); Barrall Aff. para. 2-4 (R-29); Kessler Aff. para. 2-3 (R-42).

[5] Barrall Aff., *id.*

are demonstrated by employees of all ages,[6] and that the communication and representational activity performed by older persons is most effective.[7] In fact, the record establishes what common sense dictates: that Foreign Service employees are wiser in handling overseas life and better equipped to perform their duties after gaining the maturity and experience that come with age. The Government has simply failed to show that overseas Foreign Service work is likely to become unmanageable for, or to have a particular debilitating effect upon, Foreign Service employees who reach age sixty.

As the lower court found (J.S. App. 5A), some 55,000 non-Foreign Service federal employees work overseas without being subject to mandatory retirement at age sixty. Evidently no special retirement provision was considered by Congress for these overseas Civil Servants. This may be due to the absence of the "mystique" which surrounds the Foreign Service. However, "mystique" alone cannot support a legislative discrimination between Foreign Service employees and Civil Service employees with regard to a mandatory retirement age. The argument that age sixty mandatory retirement relates to long years of overseas work is contradicted by the fact that the group of employees most recently brought under the Foreign Service Retirement System does not, in fact, serve abroad. The Foreign Affairs Specialist (FAS) programs instituted in the early nineteen seventies by the State Department and USIA (ICA) involved the conversion to the Foreign Service of the whole gamut of employees assigned permanently to Washington: personnel officers, data processors, television technicians, translators, attorneys, radio broadcasters, etc. Most FAS employees are indistinguishable from Civil Servants except in the way in which they are promoted and retired. FAS

[6] Barrall Aff. para. 2 (R-29).

[7] English Aff. para. 3 (R-42); Fox Aff. para. 2-3 (R-42).

employees were made subject to mandatory retirement at age sixty over a period of several years.[8] Recently, USIA (ICA) discontinued the FAS program and instituted a Revised Personnel System based upon the principle of separate overseas and domestic services. The new domestic service, containing both Civil Service and FAS employees, operates under Civil Service procedures in assignment and promotion. Yet, domestic service FAS employees, who are not subject to overseas assignment, continue to participate in the Foreign Service retirement system.[9]

III. MANDATORY RETIREMENT AT AGE SIXTY IS NOT AN ESSENTIAL ELEMENT OF THE FOREIGN SERVICE PERSONNEL SYSTEM WHICH IS DESIGNED TO ACHIEVE A HIGH LEVEL OF COMPETENCE.

An impression has been made that the suspension of mandatory retirement as a result of the district court's decision has created a nearly insurmountable barrier to upward movement in the Foreign Service, and that this Court's affirmance of that decision will mean the end of the Foreign Service system as presently designed. The truth of the matter is that there is a long and tortuous history of problems in the Foreign Service, pre-dating this litigation, which has made upward mobility on the basis of merit more difficult. These numerous and complex problems have been both internally produced and ex-

[8] Legislative authority for the FAS programs is contained in Pub. L. 90-494, 82 Stat. 814, 22 U.S.C. § 931. Inclusion in the Foreign Service Retirement System is provided for in *id.*, § 9(c), § 16(a), 22 U.S.C. § 1229(c), § 930(a). Regulations governing the FAS program in USIA (ICA) are contained in USIA Manual of Operations and Administration, V/A-V/B § 1000, and USIA Circular 411D and 414F (August 31, 1973).

[9] Regulations outlining the new Revised Personnel System are contained in USIA Circular 487D and 486F (December 19, 1977).

ternally imposed. Though well documented in official reports [10] and Congressional records, the problems have been ignored in the presentations of the Government and the American Foreign Service Association (AFSA).

The absence of voluntary retirements in the Foreign Service during the last year has been attributed here to the district court's decision. However, in testimony to Congress [11] and in communications to the public [12] the Government and AFSA have acknowledged that, in fact, the cause is the long-delayed increase in the federal salary ceiling which occurred in early 1977: senior officers whose pay had been frozen at $36,000 suddenly received a raise to $47,500. Since one's retirement annuity is normally figured on the three highest salary years, the salary increase created a compelling reason for officers to delay retirement until 1980 so as to enjoy the full benefit of the pay increase. Congress in response is considering a special retirement provision allowing senior employees to retire on the basis of a single highest salary year until 1980. The legislative history makes it clear that the source of the recent retirement problem in the Foreign Service is the executive pay increase and not this litigation.[13]

---

[10] *See, e.g.*, Report of the Commission on the Organization of the Government for the Conduct of Foreign Policy (1975); Report of the Secretary's Committee on Personnel, Toward a Stronger Foreign Service (June 1, 1954).

[11] *Foreign Relations Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong. 2d Sess. 10, 215 (1978) (statement of Harry G. Barnes, Jr.) (statement of Lars H. Hydle).

[12] Department of State Newsletter, Dec., 1977 at 48-49; Foreign Service Journal, Aug., 1978, at 46.

[13] *Foreign Relations Authorization Act, Fiscal Year 1979: Report on S. 3076 of the Senate Comm. on Foreign Relations*, Rep. No. 95-842, 95th Cong., 2d Sess., 25 (1978).

Great emphasis has been given to the argument that the suspension in the Foreign Service of mandatory retirement at age sixty has seriously reduced the number and frequency of promotions and will continue to do so by nullifying a well-designed system of "up and out." However, the problem of declining promotions is not new [14] and has many causes. In order to understand them it is necessary to know something about the way in which promotion opportunities in the Foreign Service are determined. Essentially what is involved is a comparison between the number of officers of a certain rank with the number of positions at the next higher rank. The number of positions is determined administratively, not by statute, and is based on a number of factors: budget, classification structure, staffing patterns, etc. Vacancies for the upcoming year are projected and eventually a number of promotion "opportunities" is established for each rank. The Secretary of State and Director of USIA (ICA) retain the discretion to further modify these numbers.[15] Major cuts in the Foreign Service budget ordered by both the Office of Management and Budget and the Congress, have substantially reduced the number of Foreign Service positions during the last decade. Budget restrictions have also led the agencies to downgrade or eliminate higher ranked positions, and to limit the number of promotions allowed to the higher salaried ranks. Given the operation of the system, the inability of higher level employees to move up has meant not only fewer promotions to the higher ranks but also reduced mobility for middle and junior level employees. To exacerbate the situation both USIA (ICA) and the De-

---

[14] *News and Views* (Newsletter of American Federation of Government Employees, Local 1812), February 28, 1974, in which the serious decline in promotions for ranks 3, 4, and 5 in the years 1970 to 1973 was noted.

[15] Section 623, Foreign Service Act of 1946, 60 Stat. 1014, as amended, 22 U.S.C. § 993.

partment of State engaged in excessive overgrading of positions thereby creating a scarcity of jobs in the middle grades to which junior officers could be promoted.[16] Further problems affecting promotions have stemmed from political patronage appointments in the Department of State and USIA (ICA) made under the "reserve" authority of the Foreign Service Act,[17] and under Schedule "C" of the Civil Service system.[18] This method of filling positions reduces the number of advancement opportunities for career employees. Finally, promotions were curtailed during the years from 1973 to 1977 after certain aspects of the selection-out process were held unconstitutional by court decision.[19] Delay by USIA (ICA) and the Department of State in implementing the decision, meant that selection-out did not function for a substantial period.[20]

In light of these and other problems it is understandable that dissatisfaction with the rate of promotion and lowered morale could arise in the Foreign Service. However, the existence or non-existence of mandatory retirement at age sixty is irrelevant to this condition. If there

---

[16] Civil Service Commission, Report on Personnel Management at the Dept. of State, 1975; USIA, Report of a Task Force Study of USIA, 1975-76. The USIA report concluded that as a result of overgrading the Agency was unable to provide "proper developmental opportunities for its lower grade officers" (at 9).

[17] Section 522, Foreign Service Act of 1946, 60 Stat. 1009, as amended, 22 U.S.C. § 922. Appointment of reserve officers is made without usual examination, for periods not to exceed five years.

[18] 5 C.F.R. § 213, §§ 3301-99 (1977).

[19] *Lindsay* v. *Kissinger*, 367 F.Supp. 949 (D.D.C. 1973).

[20] There were no selections-out from 1973 to 1976. Def. Ans. to Pl. Amended First Interrog. No. 2 (R-49); *Foreign Relations Authorizations for Fiscal Year 1977: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 94th Cong., 2d Sess., 143 (1976) (letter from Carol C. Laise to Representative Leo J. Ryan).

is declining competence in the Foreign Service, or a forecast of such, it is attributable to other causes. There should be little concern about the prospect of retaining a number of employees who, at the age of sixty, have survived rigorous entry examinations, biennial medical check-ups, annual evaluation and selection board review, selection out, disability retirement, and still wish to continue working. The Government can only speculate on the effect of eliminating mandatory retirement at age sixty. If the rest of the federal sector is a valid point of reference, the effect will be *de minimus*.[21] The Department of State's own figures suggest as much: it is reported that Foreign Service employees on the average have been retiring at the age of fifty-five.[22] Other information recently presented to Congress supports the projection of a *de minimus* effect:

> The trend in recent times has been toward early retirement. In 1974, 72 percent of all Social Security retirees opted for reduced benefits with age 62 as the overwhelmingly most common age. . . . At Connecticut General Life Insurance Co., which recently eliminated compulsory retirement two of 50 retiring employees decided to stay on in 1977.
>
> A recent Roper poll found that nearly two-thirds of Americans would like to retire before age 62 and over one-third of Americans would like to retire before reaching 60.

Retirement Age Policies (Part 1): Hearing Before the House Select Committee on Aging, Comm. Pub. No. 95-

---

[21] According to the United States Civil Service Commission Preliminary Report on Civil Service Retirement (Fiscal Year 1977), only two percent of federal workers were mandatorily retired at age seventy in 1977. The report projects no major impact on the Federal Service from eliminating compulsory retirement age and no detrimental effect on the employment of younger people.

[22] *Federal Times—Retirement Supplement*, Oct. 17, 1977, at R-1, Col. 1.

88,' 95th Cong., 1st Sess., 31 (1977). (Statement of Senator Jacob Javits).

In any case, the Government maintains that early retirement is inextricably intertwined with the operation of the selection-out procedure and is necessary for its proper functioning.[23] We fail to see why this is true. Selection-out for "time-in-class" is the only form of selection-out related to the rate of promotion, rather than to substandard performance. Time-in-class periods are not set by statute, but are established administratively.[24] They can be, and are, changed periodically to adjust to new circumstances. There is no basis in the record upon which to argue that as an essential component of the selection-out procedure, mandatory retirement at age sixty in some way maintains a "balance" in the Foreign Service which promotes competence. Eliminating age sixty mandatory retirement would improve the demographic balance of the Foreign Service and might, for that very reason, increase its effectiveness. In recent years the foreign affairs agencies have made it a priority to achieve a more representative character.[25]

---

[23] The Government has also characterized the plaintiffs as seeking to "improve their lot" (Brief for Appellant at 34) by challenging one aspect of a personnel system that allegedly benefits them in ways that the Civil Service system would not. This characterization is unfair in several respects. First, as to whether the Foreign Service Retirement System is "better" than the Civil Service System, opinions vary and depend essentially on personal preference. Second, whatever the relative merit of the two systems, this issue is irrelevant to the case at hand. The Government has cited no authority for its argument for a "Foreign Service employment 'package' " (*id.*, at 35).

[24] Section 633(a) Foreign Service Act of 1946, 60 Stat. 1015(a), as amended, 22 U.S.C. § 1003.

[25] *Foreign Relations Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 2d Sess., 9 (1978) (statement of Harry G. Barnes, Jr.).

One might conclude from the Government's presentation that eliminating an earlier mandatory retirement age for the Foreign Service will result in an undesirable entrenchment of older officers. Such a conclusion would be erroneous. Foreign Service employees regularly rotate between assignments, and an agency may reassign an employee at any time in the interests of the Service.[26] Extensions of normal tours of duty are within the sole discretion of the agency. Furthermore, employees not only rotate between foreign posts and Washington assignments; they are also assigned to other federal agencies[27] and to state, county or municipal governments and private organizations.[28] Thus, Foreign Service employees regularly receive new positions in new environments. They remain in one position only by management decision. In addition to rotating assignments, Foreign Service employees may receive university training at agency expense (Section 573, Foreign Service Act of 1946, 60 Stat. 1012, as amended, 22 U.S.C. 963) or sabbatical leave for educational purposes. Training is given on a continuing basis by the Foreign Service Institute, including intensive language instruction preceding overseas assignment. In the course of a career, therefore, a Foreign Service employee has a broader and more varied experience than is expected of a Civil Servant. Because of this characteristic, Foreign Service employees are much less likely to become rigid or entrenched after many years of service than those in the Civil Service who may work beyond age sixty.

---

[26] Section 514, Foreign Service Act of 1946, 60 Stat. 1008, as amended, 22 U.S.C. 909.

[27] Section 571, *id.*, 60 Stat. 1011, as amended, 22 U.S.C. 961.

[28] Section 576, *id.*, 88 Stat. 1440-41, as amended, 22 U.S.C. 966. The pending Foreign Relations Authorization Bill authorizes expansion of this program. *Foreign Relations Authorization Act: Fiscal Year 1979: Report on S. 3076 of the Senate Comm. on Foreign Relations*, Rep. No. 95-842, 95th Cong., 2d Sess., 12-14 (1978).

Conditions in the Foreign Service have changed since Congress established the earlier mandatory retirement age. Not only have living conditions abroad generally improved, but also life expectancies have lengthened. The traditional notion of an "elite" service has undergone change as well. Groups generally unrepresented in the Service in the past, such as women and racial minorities, are now employed and actively recruited.[29] Regular and mandatory rotations to the United States have lessened the degree of isolation. There is a smaller number of positions overseas[30] as well as an increasing preference among younger officers to spend more time in Washington.[31] And, a workforce that was once viewed as serving solely at the pleasure of the President, has achieved collective bargaining rights, sharing in many decisions that at one time were within the discretion of the Depart-

[29] In a recent address on Foreign Service Day, 1978, Under Secretary of State for Political Affairs David Newsome stated, "There is a need to adjust the composition of the Service, to recognize the expanding role of women, to adjust more fairly the participation of minorities, and to take account of the changing professional requirements of our diplomacy." Department of State Newsletter, June, 1978 at 5.

[30] *Foreign Relations Authorization Act: Hearings Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., 139 (1977) (Statement of John Reinhardt); *Foreign Relations Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 2d Sess., 214-5 (1978) (statement of Lars H. Hydle).

[31] Memorandum from William E. Carroll, Director of Personnel, to USIA Executive Comm. (March 19, 1975). "Another significant change is the very strong general preference for more and longer assignments in the U.S. A few years ago, most officers wanted to remain overseas as long as possible. Today, a large number of officers want to return to the U.S. before completing the seven-to-ten years overseas that our assignment policy generally requires. This trend is most pronounced among junior and younger mid-grade officers." *id.*

ment.[32] Any basis for mandatory retirement at age sixty must be rational in terms of these present day conditions. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 (1938).

IV. STANDING ALONE, THE ENHANCEMENT OF PROMOTION OPPORTUNITIES FOR YOUNGER FOREIGN SERVICE EMPLOYEES CANNOT SERVE AS A RATIONAL BASIS FOR MANDATORY RETIREMENT AT AGE SIXTY.

The Government contends that there is a rational basis for a lower mandatory retirement age for the Foreign Service in the fact that it affords greater opportunities for younger officers to advance. The record fails to show, however, that such an effect in any way relates to maintaining a highly competent and professional diplomatic corps. On the contrary, the record establishes that the quality of the Foreign Service does not depend upon the absence of employees over the age of sixty; the record rebuts any notion that younger officers necessarily perform better than older ones. Without a clear nexus between diminished performance ability and age, the purpose of enhancing promotion opportunities for younger employees at the expense of older ones is patently discriminatory. The lower court so found. (J.S. App. 4A) The public policy behind the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. §§ 621, *et seq.*, and similar state enactments indicates that conclusions about employee ability should not be based solely on age. While there may be no "fundamental right" to employment, the courts have treated employment as an important aspect of the "liberty" and "pursuit of happi-

[32] Executive Order No. 11636, 36 Fed. Reg. 24901, *reprinted in* 22 U.S.C. § 801 (effective December 17, 1971) gave collective bargaining rights to members of the Foreign Service.

ness" protected by the Constitution.[53] Thus, employment should not be made less available to one class of persons than another without some legitimate purpose being served.[54] Foreign Service employees age sixty and above should not suffer termination of their employment due to unsubstantiated views on the effects of age on their performance.

As artificial barriers of race, sex and age are eliminated from the Foreign Service, more employees will be competing for the same number of positions and opportunities. For some, this will do violence to the traditional concept of an "elite corps". In truth, however, the Foreign Service will benefit from the diversity in background and experience of its employees. The high level of competence will be maintained because competition will take place upon the one basis in which all are potentially equal, that is, ability. The foreign affairs of the United States will be conducted by a skillful and dedicated diplomatic corps which is itself founded on rational principles consistent with the Constitution.

---

[53] *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972).

[54] This court has rejected the notion that work is less important for women than for men and has struck down discrimination based on this premise. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 643 (1975).

CONCLUSION

For the reasons stated the judgment of the district court should be affirmed.

Respectfully submitted,

WILLIAM J. MAHANNAH
Staff Attorney for American
Federation of Government
Employees as *Amicus Curiae*

MARY E. JACKSTEIT
Staff Attorney for American
Federation of Government
Employees Local 1812

No. 77-1254

In the Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
APPELLANTS

v.

HOLBROOK BRADLEY, ET AL.

On Appeal from the United States District Court
for the District of Columbia

MOTION FOR LEAVE TO FILE AS AMICI CURIAE AND BRIEF AMICI CURIAE

FOR HON. CLAUDE PEPPER, HON. EDWARD R. ROYBAL, HON. FRED B. ROONEY, HON. MARIO BIAGGI, HON. JOHN L. BURTON, HON. JOHN PAUL HAMMERSCHMIDT, HON. CHARLES E. GRASSLEY, HON. MATTHEW J. RINALDO, MEMBERS OF CONGRESS AS AMICI CURIAE

CLAUDE PEPPER
U.S. HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

EDWARD F. HOWARD
MERRILL RANDOL
SELECT COMMITTEE ON AGING
U.S. HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1978
NO. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
APPELLANTS

V.

HOLBROOK BRADLEY, ET AL.

On Appeal from the United States District
Court for the District of Columbia

MOTION OF HON. CLAUDE PEPPER, HON. EDWARD R. ROYBAL, HON. FRED B. ROONEY, HON. MARIO BIAGGI, HON. JOHN L. BURTON, HON. JOHN PAUL HAMMERSCHMIDT, HON. CHARLES E. GRASSLEY, HON. MATTHEW J. RINALDO FOR LEAVE TO FILE BRIEF AMICI CURIAE

MEMBERS OF CONGRESS AS AMICI CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, Hon. Claude Pepper, Hon. Edward R. Roybal, Hon. Fred B. Rooney, Hon. Mario Biaggi, Hon. John L. Burton, Hon. John Paul Hammerschmidt, Hon. Charles E. Grassley, Hon. Matthew J. Rinaldo respectfully move the Court for leave to

file a brief amici curiae in the above entitled case. Counsel for appellants has denied movants' request to file brief of amici curiae; the appellees have granted their consent.

INTEREST OF AMICI

Amici are members of Congress with a unique interest in the fairness and efficiency of the Federal Government. Amici are also members of the Select Committee on Aging which has been mandated by the House of Representatives to study and review the problems of older Americans, including the problems of income maintenance and employment.

Representative Claude Pepper, in addition to chairing the Committee on Aging, was the principal sponsor and co-manager for floor consideration of the bill which became the Age Discrimination in Employment (ADEA) Amendments of 1978, Pub. L. 95-256, 92 stat. 189.

Amici as members of Congress have day-to-day experience in the process of legislation: discerning problems with legislative solutions, developing legislation to ameliorate such problems, and obtaining the prerequisite votes to enact the necessary legislation. From this perspective, they can uniquely address the legislative intent underlying the Acts of Congress discussed in appellants' brief. Moreover, amici are singularly placed to address the broader interest of persons affected by mandatory retirement requirements in general, issues regarding which

are raised by the instant appeal.

It is to bring this unique perspective in addressing the issues raised herein that has prompted amici to file this motion seeking leave to file its amici curiae brief.

Amici respectfully request the leave of this Court to file a brief amici curiae presenting their views of the important issues raised herein.

Respectfully Submitted,

Claude Pepper
Edward F. Howard
Merrill S. Randol
Select Committee on Aging
House of Representatives
Washington, D. C. 20515

Attorneys for Honorable
Claude Pepper, et al.

September 22, 1978

INDEX

TABLE OF AUTHORITIES

Statutes:

Miscellaneous:

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1978
NO. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.

On Appeal from the United States District
Court for the District of Columbia

BRIEF FOR HON. CLAUDE PEPPER, HON. EDWARD R. ROYBAL, HON. FRED B. ROONEY, HON. MARIO BIAGGI, HON. JOHN L. BURTON, HON. JOHN PAUL HAMMERSCHMIDT, HON. CHARLES E. GRASSLEY, HON. MATTHEW J. RINALDO

MEMBERS OF CONGRESS AS AMICI CURIAE

PRELIMINARY STATEMENT

In accordance with Rule 42 of the Rules of this Court, this brief amici curiae is filed in support of the position of appellees, pursuant to a timely motion for leave to file such brief.

QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, which requires participants in the Foreign Service Retirement System to retire at age 60, violates the equal protection guarantees embodied in the Due Process Clause of the Fifth Amendment.

STATEMENT OF INTEREST

Amici are members of Congress concerned both with fair treatment of older employees of the Federal Government and with the efficient functioning of the Department of State and the International Communications Agency (ICA).

All amici are also members of the Select Committee on Aging, created by vote of the House of Representatives in 1974 with jurisdiction, among other duties, "to conduct a continuing comprehensive study and review of the problems of the older American, including but not limited to income maintenance...[and] employment...."1/

Rep. Pepper chairs the Committee, and its Subcommittee on Health and Long-term Care. Rep. Rooney chairs the Subcommittee on Retirement Income and Employment. Rep. Roybal chairs the Subcommittee on Housing

---

1/ Rule 10, Clause 6, Rules of the House of Representatives, 95th Cong., 1st Sess. (1977).

and Consumer Interests, and Rep. Hammerschmidt is the Subcommittee's Ranking Minority Member. Rep. Biaggi chairs the Subcommittee on Human Services.

Rep. Pepper, in addition to chairing the Committee on Aging, was the principal sponsor, and co-manager for floor consideration, of the bill 2/ which became the Age Discrimination in Employment (ADEA) Amendments of 1978, Pub. L. 95-256, 92 Stat. 189.

Through hearings, reports and recommendations, the Select Committee on Aging has conducted an ongoing inquiry into discrimination on the basis of age in federal, other governmental and private employment. 3/

2/ H.R. 5383, 95th Cong., 1st Sess. (1977).

3/ See, e.g., Age and Sex Dicrimination in Employment and Review of Federal Response to Employment Needs of the Elderly: Hearing Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. (1975); Impact of the Age Discrimination in Employment Act of 1967: Hearings Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 2d Sess. (1976); House Select Committee on Aging, 94th Cong., 2d Sess. (1976), Funding of Federal Programs for Older Americans (Comm. Print); Retirement Age Policies (two parts): Hearings Before the House Select Committee on Aging, 95th Cong., 1st Sess. (1977).

We believe that no defensible purpose is served by forcing the retirement of those covered by the Foreign Service Retirement System solely because of the attainment of an arbitrary age.

We believe more generally that mandatory retirement persists in our society principally because of myths and stereotypes about older people. Principal among these is that there is some precipitous decline in ability as some magic chronological marker is passed. As we intend to show below, our inquiries have substantiated that the opposite is true: that chronological age is not a good predictor of occupational competence. Another persistent myth posits massive administrative problems if older workers are not forced out at a specific age. We must ask, as our Committee asked in its 1977 report on mandatory retirement, "Why, when administrators must every day evaluate the competency of the younger worker, does that task become so onerous when the worker reaches 65?" 4/

Finally, we view as pernicious the notion that a younger worker has the right to an older worker's job simply because he or she is younger. As our Committee observed in its report,

---

4/ House Select Committee on Aging, 95th Cong., 1st Sess. (1977), Mandatory Retirement: The Social and Human Cost of Enforced Idleness 35 (Comm. Print).

> [T]he ethical or social grounds for arguing that a younger person has more right to a job than an older person seem non-existent. The mentality that would rob jobs from the old to give to the young apparently assumes that, given a choice between young and old, the elderly should suffer. Id. at 36.

We believe that the mandatory retirement age for those under the Foreign Service Retirement System reflects the myths described above. We agree with appellees and the district court that, since the policy is rationally indefensible, it must fall before the equal protection guarantees embodied in the Due Process Clause of the Fifth Amendment.

It is to present this Court with our unique views on this matter that we file this brief.

SUMMARY OF ARGUMENT

The mandatory retirement age of 60 established for Foreign Service personnel by Section 632 of the Foreign Service Act of 1946 differs markedly from the mandatory retirement age of 70 imposed on most Civil Service employees. The district court in this case held that this distinction, since it was not supported by a rational basis, was unconstitutional.

1. We submit that a careful examination of the fifty-four year legislative history of the Foreign Service and its

predecessors yields nothing that contradicts the district court's finding, especially as it bears on the contention that the "rational basis" for the earlier retirement age lay in the unique rigors of the duties these persons must perform. Indeed, the most reasonable conclusion to be drawn from this legislative history is that, until very recently, Congress did not focus on the policy issues inherent in setting a particular mandatory retirement age. When the matter began to attract attention, the first tangible legislative result was enactment of a law to liberalize mandatory retirement ages, and to abolish them completely for most federal employees.

Appellants' reliance on the latest legislation is misplaced. That the mandatory retirement age set in Section 632 remained intact is a reflection, not of a policy judgment about the correctness of that age for Foreign Service forced retirement, but rather a desire by proponents of the legislation to expedite its enactment.

Another striking aspect of the legislative history of Section 632 is that nowhere could factual data be found to substantiate the claims of rationality now made in its behalf.

2. Even if this Court decides that Section 632 withstands the "minimum rationality" test, district court's decision should stand.

The "strict scrutiny" test, where denial of due process is claimed, is reserved for the protection of fundamental rights, or in cases where suspect classifications are involved. It is well settled that the right to a government job is not "fundamental," and this Court has held that age is not a suspect classification. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307.

However, as the right involved becomes more important, if not fundamental, and the classification involves discrimination based on outmoded stereotypical notions about the members of the class, a standard of heightened scrutiny, beyond minimum rationality, is appropriate.

When judged against this more appropriate benchmark, the rational basis suggested by appellants as underpinning for the lower mandatory retirement age is singularly wanting.

Murgia does not, we submit, compel a result different from the district court's holding. The finding that certain physical aspects of aging, documented by the employer, provided a rational basis for retiring uniformed law enforcement officers at an early age does not preclude a different conclusion when the work involved is intellectual rather than physical, and when scant evidence is proferred to substantiate the claim that the ability to fulfill certain duties declines with age.

Our examination of the legislative history of the Foreign Service Act yielded

only slight references to the mandatory retirement provision, and those references were either vague or conclusory.

Particularly under this standard of heightened scrutiny, which is a proper one, Section 632 cannot survive.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT SECTION 632 OF THE FOREIGN SERVICE ACT OF 1946, AS AMENDED, WHICH REQUIRES FOREIGN SERVICE EMPLOYEES TO RETIRE AT AGE 60, HAS NO RATIONAL BASIS AND IS THEREFORE AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS.

A.

Section 632 has no rational basis supportable by the facts and circumstances involved in this case.

Respecting this argument, amici curiae concur fully upon the matters set out and discussed in the brief of appellees, respectfully pray that they be incorporated in this brief.

B.

Section 632 is not supported by any determination of the Congress that mandatory retirement at age 60 of Foreign Service Employees is rationally required because of the uniquely demanding nature and circumstances of service in that agency.

1. Appellants are in error in contending that the Congressional rationale for establishing a mandatory retirement age of 65 in the Act that in 1924 created the Foreign Service was that such retirement was required because Foreign Service Officers were rotated among remote posts overseas and frequently experienced disruptive changes in their way of life.

Appellants contend the reason that Congress has mandated a lower retirement age for Foreign Service employees than for Civil Service employees is that Foreign Service work is uniquely demanding Gov. Br. at 12. In support of this assertion, appellants discuss the legislative history of the Foreign Service Act of 1924 5/, which established a mandatory retirement age of 65 for Foreign Service Officers in contrast to the age of 70 for most Civil Service employees who had rendered at least 15 years of service 6/. However appellants are able to cite only one brief exchange during the floor debate in which Rep. Rogers articulates a vague and speculative reason for the retirement age being set at sixty-five.

In actuality, in its discussions concerning the Foreign Service Act of 1924, Congress did not focus on the issue of mandatory retirement, much less at what

---

5/ Act of May 24, 1924, 43 Stat. 140.

6/ Act of May 22, 1920, 41 Stat. 614.

age it should be instituted. Rather it concentrated on legislating certain procedures and inducements to obtain well qualified Foreign Service officers. 7/ To this end it formulated a statement of the following four fundamental purposes:

"1. The adoption of a new and uniform salary scale with a modest increase in the average rate of compensation.

"2. An amalgamation of the Diplomatic and Consular Service into one Foreign service [with officers serving in either] on an interchangeable basis.

"3. Representation allowances for the purpose of eliminating, or at least of lessening, the demands on the private means of ambassadors and ministers...

7/ Representative Linthicum stated, "Individuals and corporations may continue to outbid the Government on the question of salaries, but, through the retirement system, the increase of salary, the advantages of educational and social features of the foreign service, I believe we will be able to hold our men and that they will feel satisfied to make this their life work, thereby affording the Government men of exceptional training, ability and experience." 65 Cong. Rec. 7570 (1924).

"4. A retirement system based upon the principles of the [C]ivil [S]ervice [R]etirement and [D]isability [A]ct of May 22, 1920, but administered entirely separately therefrom." H.R. REP.NO. 157, 68th Cong., 1st Sess. 2(1924).

The necessity for these changes lay in the inadequacy at that time of the American diplomatic and consular service to support the expanding overseas financial and political activities of the United States. The spoils system of appointing and promoting diplomatic and consular officers had existed (with some minor reforms) from the early days of the nation until after World War 1. 8/ A report of a Joint Select Committee of Congress noted as early as 1968 that the shortcomings of the Diplomatic Service included "lack of special

---

8/ Arthur G. Jones, The Evolution of Personnel Systems for U.S. Foreign Affairs, A History of Reform Efforts (Carnegie Endowment for International Peace, 1965). Jones, a career Foreign Service officer, notes in his authoritative study of the development of the Foreign Service, "Reform efforts to eliminate the spoils system, provide adequate salaries and allowances and assure appointment, tenure and promotion on the basis of merit were continually frustrated." Id. at 2.

knowledge and experience, improper selection without regard to qualifications and short tenure of office." 9/

The lack of a merit system for appointing and promoting Consular Service officers had been subject to similar criticisms. The existence of salaries for consular officers, however, particularly at higher levels, meant that the tenure of consular officers tended to be of longer duration than the short tenures of unsalaried or low-salaried officers in the Diplomatic Service. The absence of any retirement plan until the Rogers Act in 1924 also encouraged consular officers to remain in their salaried posts for long periods of time and had made it hard to dislodge very senior officers. 10/

In discussing the proposals for the establishment of a retirement system, Congress focused on the institution of a pension system rather than on mandatory retirement. 11/

9/ Jones, supra, at 4.
10/ Id. at 9.
11/ See 65 Cong.Rec. 7567, 7569, 7579 and 7584-87.

The Secretary of State, Charles E. Hughes, voiced his concern over the lack of a pension system:

> What are they going to do when they come to 65 years of age, after thirty-odd years in the Service: They cannot go into anything else; they are through. There ought to be some provision for retirement allowances. H.R. REP. NO. 157, 68th Cong., 1st Sess. 16 (1924).

Indeed, the mention of a retirement age of sixty-five in the Senate Report was in the context of the cost of the pension system for officers retiring before having contributed their full amount to the fund. S. REP. NO. 532, 68th Cong., 1st Sess. 4 (1924).

It can be inferred from the legislative history of the Act that the reason for the institution of a mandatory retirement age at sixty-five was the British consular service's use of such a retirement age 12/ and Congress' desire to follow British precedent. This desire

---

12/ In the British service retirement was voluntary at age 60 and compulsory at 65 unless the Government wished to continue an officer in service longer, in which case it could continue him by intervals until he was 70 years of age. For the Reorganization and Improvement of the Foreign Service of the United States: Hearings on H.R. 17 and H.R. 6357 Before the House Committee on Foreign Affairs, 68th Cong., 1st Sess. 164 (1924).

to imitate the British system is illustrated by the comments of Representative Moore of Virginia:

> Everyone knows that our principal competitor among the foreign nations is Great Britain...This bill in dealing with the Diplomatic and Consular Service will merely approximate what Great Britain has found necessary in order to carry on her business with other nations. 65 Cong. Rec. 7567 (1924).

During the same debate, Representative Linthium stated:

> I was speaking a moment ago about the salaries paid by Great Britain, and she is no more able to pay competent salaries than is the United States. Certainly we owe a competency to our men in the foreign service. Id. at 7568.

The sole articulated reason given by one member of Congress for the enactment of a mandatory retirement age of sixty-five -- that foreign service involves living in the tropics -- was undoubtedly not a consideration then in the collective Congressional mind. Moreover, to consider it as a basis for holding such mandatory retirement lawful today, we must consider the conditions of life in the tropics today.

While discussing the longevity of Foreign Service officers with reference to actuarial figures, Rep. Rogers stated that longevity ought to be the same for

the officers as for persons in regular walks of life except in the tropics, where men are exposed to many tropical diseases not encountered elsewhere. Id. at 163. Although not explicitedly mentioned, Congress may also have had concern about the effect of heat in the tropics on those over 65 years of age. 13/

Certainly both of these concerns about the unhealthy effects of the tropics no longer have a solid base in our modern age, for the problems have been largely ameliorated by modern medicine and technology. Diseases such as smallpox, yellow fever and malaria are now preventable and treatable, and tropical heat has been conquered by air conditioning.

> 2. Appellants are in error in contending that Congress, in the several amendments to the 1924 Act creating the Foreign Service, has reaffirmed its assessment that the overseas work of Foreign Service officers mandates their early retirement.

13/ Congress also provided in this legislation that each year in the tropics would count as one and 1/2 years for purposes of length of service calculation. Thus, Congress also expressed its concern about tropical climates in the formula for receiving pension benefits. Act of May 24, 1924, 43 Stat. 140, Sec. 18(k).

Appellants cite and discuss several of the amendments to the 1924 Act and argue that each of these amendments constituted a reaffirmation of an assessment by Congress that early mandatory retirement was necessary because of the effects of overseas work on Foreign Service personnel. Gov. Br. 15-19. The materials cited, however, do not support that argument. Rather they support the proposition that Congress intended to reward Foreign Service employees by providing early mandatory retirement.

The extended statement of Secretary of State Hull, while giving a detailed description of the hardships of Foreign Service officers, concludes only that such hardships indicate that early retirements should be "authorized by Law," that is, that retirement of officers who possibly were adversely affected or who were simply tired of the cited disadvantages, should be rewarded with an opportunity to retire early. Mr. Hull does not mention mandatory retirement. Id. at 15-16. Similarly, the report of the Committee on Retirement Policy for Federal Personnel, except for a vague reference to a lower compulsory retirement age instituted in recognition of the needs of a career service and of the disadvantages of employment abroad, discusses the reasons why Congress conferred preferential treatment of Foreign Service employees, not why it disadvantaged them with early mandatory retirement. Id. at 15-16.

In further support of this proposition, the amendments in 1960 which expanded the coverage of the Foreign

Service Retirement System were stated by Congress to be "designed to give recognition to the need for an earlier retirement age for career Foreign Service personnel who spend the majority of their working years outside the United States." Id. at 18-19. This statement implies no more than that early voluntary retirement is necessary as a reward for the disadvantages of a Foreign Service career. Finally, the language of a House Report which accompanied the 1973 amendments of the 1925 Act states that the Foreign Service Retirement System "provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service." Id. at 196. Surely the lower mandatory retirement age, which forces participants into lower incomes ten years before their Civil Service counterparts, cannot be such a "more favorable" condition.

Not mentioned by the appellants is the legislative history of the Foreign Service Act of 1946, 60 Stat. 999, which is significant to the case at hand, for it was this Act which reduced the mandatory retirement age for Foreign Service officers from 65 to 60. However, a review of the debates and reports on this legislation reveals no Congressional finding that employees between the ages of 60 and 65 had been unable to function as effectively as their younger colleagues. Rather, the 1946 Act

was aimed at establishing a career system in which the best qualified persons, chosen through competitive examinations, entered the Foreign Service officer corps and advanced, or not, on the basis of merit. The statement of purpose of the 1946 Act affirms this conclusion; it speaks exclusively of such matters as recruitment, promotion based on merit and impartial selection of persons for important assignments.

In summary, there is nothing in the legislative history of any of the enactments of Congress from 1924 to 1978 which reveals any findings by the Congress that Foreign Service employees and other covered persons become so ill, infirm or debilitated by the conditions of their employment that a lower mandatory retirement age for them is necessary. In fact, with respect to each of these enactments, neither the State Department nor the Foreign Service itself has ever offered the Congress any evidence of instances of lessened ability or competency, any statistics of a greater number of earlier disability retirements, or any data which would indicate that the "selection out" process authorized in the Foreign Service Retirement System has not worked successfully in weeding out those members of the service who, for one reason or another, had suffered a diminution of competency in the later years of their careers. Consequently, even if Congress had made findings as to such adverse effects of Foreign Service career assignments, such findings would be no more than mere speculation or unsupported stereotyping.

3. Appellants are in error in contending that the exclusion of Foreign Service employees from the 1978 amendments to the Age Discrimination in Employment Act reveals Congressional sensitivity to the unique requirements of the Foreign Service, thereby implying that such action constituted an affirmation of the rationality of mandatory Foreign Service retirement at age 60.

It is true that, as stated by appellants, when Congress on April 6, 1978, enacted the Age Discrimination Act Amendments of 1978, Public Law 95-256, 92 Stat. 189, it excluded from the effect of that law Foreign Service mandatory retirement provisions as well as certain other such provisions. Gov. Br. 20,21. It is, however, clear from the history of this enactment that such exclusions were expedients that were accepted by the Congress solely to avoid delay of the bill because of House Committee jurisdictional demands.

H.R. 5383, 95th Cong., 1st Sess. (1977) as introduced and considered by the House Committee on Education and Labor, would have amended Section 15(a) of the Age Discrimination in Employment Act, 29 U.S.C. (Supp. V) 633a(a), to read, "Notwithstanding any other provision of Federal Law relating to mandatory retirement requirements...., all personnel actions affecting employees....in executive agencies....shall be made free from any discrimination based on age."

H.R. 5383, supra, at 5. If it had been enacted, this provision would have eliminated mandatory retirement ages not only for the general civil service but also for certain employees of the Central Intelligence Agency, the Postal Service, the Federal Aviation Agency, the Foreign Service, and a number of other federal entities. After the House Education and Labor Committee had reported the bill on July 25, 1977, the Committee on Post Office and Civil Service, which has jurisdiction over federal personnel retirement policies, requested and received permission for sequential referral of the bill to that Committee. At about the same time, the International Relations Committee expressed its intention to request a similar sequential referral of the bill based on its jurisdiction over Foreign Service personnel matters. Informal inquiries along the same line were also received by the bill's sponsors from the Armed Services Committee, which has jurisdiction with respect to employees covered by the special retirement system of the Central Intelligence Agency. It was apparent at this time to the sponsors of the bill that sequential referral of the bill to the several committees which had jurisdiction over a portion of the personnel intended to be covered by the bill, for their study, possible hearings, and reports, would have entailed months of delay and perhaps even the demise of the legislation during the 95th Congress.

Rep. Perkins, Chairman of the Committee on Education and Labor, and

Rep. Hawkins, Chairman of its Subcommittee on Employment Opportunities, wrote to Rep. Zablocki, Chairman of the Committee on International Relations, concerning H.R. 5383, and stated in part:

> In an effort to expedite this legislation, we are requesting that your Committee not insist on sequential referral of H.R. 5383 pursuant to your jurisdiction over the Foreign Service with the understanding that we accept the amendment proposed by Robert Nix, Chairman of the Post Office and Civil Service Committee at such time as the House considers this measure. The Nix amendment includes Foreign Service personnel in its exemption from the effect of H.R. 5383 [to end mandatory retirement in federal employment]. 124 Cong. Rec. H 9346 (daily ed. Sep. 13, 1977).

Similary, Rep. Pepper, principal sponsor of H.R. 5383, and its co-manager on the floor of the House of Representatives, wrote to Rep. Nix that he, as well as the leadership of the Committee on Education and Labor, was prepared to accept an amendment to H.R. 5383 prepared by Rep. Spellman which would restrict the scope of its effect to regular civil service employees "in order to expedite the bill's consideration...." Id.

When the bill was brought up for consideration on the floor of the House of Representatives, an amendment was offered by Rep. Spellman on behalf of the

Post Office and Civil Service Committee which limited the impact of H.R. 5383 to the repeal of mandatory retirement age provisions in Title 5, U.S. Code, thus excluding from its effect statutes covering certain employees of the Central Intelligence Agency, the Postal Service, the Federal Avaiation Agency, the Foreign Service, and others. Still covered, however, were tens of millions of Americans in both public (local, state and federal) and private employment who would continue to be threatened with forcible, age-based retirement at an early age or at age 70 until the bill was enacted. Accordingly, the sponsors and managers of the bill decided not to oppose the Spellman amendment. It was adopted by voice vote, and was retained in the version of the bill enacted into law.

During the actual floor debate on the amendment, Rep. Pepper spoke in its favor, but made the following comment:

> For the record, Mr. Chairman, I should state what might appear to be obvious: That we in the House, in debating and passing this amendment, are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement. 124 Cong. Rec. H 9969 (daily ed. Sep. 23, 1977).

Also having spoken in favor of the amendment, Rep. Hawkins, the principal floor manager of the bill, made the same point:

> "By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes." Id.

There was no consideration given by the sponsors or managers of the bill, or by the full House of Representatives, to "the unique requirements of the Foreign Service." Gov. Br. at 20. On the other hand, it is true, as contended by appellant that the 1978 legislation demonstrated an intention to treat Foreign Service retirement issues separately from retirement issues concerning some other federal employees, but the intent to do so was exclusively based upon established and traditional lines of committee jurisdiction and responsibility, and not at all the result of any judgment as to the propriety of a mandatory retirement age of 60 for Foreign Service employees. Instead, the sponsors and managers of the legislation in the hearing of the whole House disavowed any such judgment. Accordingly, the argument made by appellant that the enactment of Public Law 95-256 supported the rational acceptance by Congress of the existing Foreign Service retirement law is totally refuted by the facts surrounding its enactment.

4. Appellants have brought forward no supporting data with respect to the capabilities of older workers in the face of the effects of

advancing age and the demands of the Foreign Service.

Insofar as appellants have gleaned, from fifty-four years of legislative history, statements by members of Congress or committees that seem to support the Government's argument that the unique rigors of the Foreign Service justify a lower mandatory retirement age, those statements are inconclusive, vague and wholly unpersuasive. Medical and occupational studies, competency judgment systems, or any other sort of factual underpinning for the supposed conclusions of Congress is singularly lacking.

Such data are not unavailable. In its inquiry into age-based retirement practices, the Select Committee on Aging has heard testimony about a number of studies concerning competency of older workers. Many of them were summarized in a 1977 report by the Select Committee:

> Studies by the Department of Labor, the late Ross McFarland of the Harvard School of Public Health, the National Council on the Aging, and many other experts in the field indicate that older workers can produce a quality and quantity of work equal or superior to younger workers, that they have as good, and usually better, attendance records as younger workers, that they are as capable of learning new skills and adapting to changing circumstances when properly presented as younger workers, and that they are generally more satisfied with their jobs than

> younger workers. In several reports on workers' abilities, the Department of Labor noted that there is more variation in ability within the same age group than between age groups. House Select Committee on Aging, 95th Cong., 1st Sess. (1977), Mandatory Retirement: The Social and Human Cost of Enforced Idleness 34 (Comm. Print).

In Weinberger v. Wiesenfeld, 420 U.S. 636, this Court, in considering the Constitutionality of certain gender-based distinctions in the Social Security Act, made clear that vague assertions of intent, even if they eminate from Congress, will not save a provision from an equal protection challenge:

> "This court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been the goal of the legislation." 420 U.S. at 649, n. 16.

We submit that the purpose asserted by appellants for Section 622 is inconsistent with the goal of the legislation of which it is a part.

II

IF THE DISTRICT COURT WAS IN ERROR IN FINDING THAT SECTION 632 FAILS THE MINIMAL RATIONALITY TEST, THE HOLDING THAT THE SECTION IS UNCONSTITUTIONAL SHOULD NEVERTHELESS BE SUSTAINED, SINCE THE NATURE OF THE CLASSIFICATION AND THE INTEREST BEING PROTECTED IN THIS CASE JUSTIFY A HEIGHTENED DEGREE OF SCRUTINY IN EXAMINING CLAIMS OF DUE PROCESS DENIAL.

A

Although this Court has often referred to a two-tiered approach to statutory classifications claimed to deny equal protection of the laws, that approach has not precluded varying degrees of scrutiny short of the "strict scrutiny" required when fundamental rights or suspect classifications are involved.

Mr. Justice Marshall, dissenting in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, commented that although the rigid two-tier model of analysis of equal protection of the

laws issues still holds sway as this Court's articulated description of such analysis, the model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry that the Court has undertaken in equal protection cases. 427 U.S. at 318. Mr. Justice White, concurring in judgment in Vlandis v. Kline, 412 U.S. 441, stated that it was clear that this Court did not employ just one or two, but a spectrum of standards in reviewing discrimination allegedly violative of the equal protection clause. 412 U.S. at 458. Mr. Justice Brennan, dissenting in San Antonio School District v. Rodriguez, 411 U.S. 1, concluded that as the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when that interest is infringed on a discriminatory basis must be adjusted accordingly. 411 U.S. at 62. Mr. Justice Stevens, in Craig v. Boren, 429 U.S. 190, wrote that he was inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method but is rather a means this Court has employed to explain decisions that actually apply a single standard in a reasonably

consistent fashion. His suspicions were that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of the standard of analysis than an attempt to articulate it in all-encompassing terms. 429 U.S. at 212.

Whether this Court has actually created an intermediate standard of analysis somewhere between the modes of strict scrutiny and minimum rationality, or has instead modified to some degree the rigidity traditionally associated with the minimum rationality standard is unimportant, so long as it is recognized, as stated by this Court in Mathews v. Lucas, 427 U.S. 495, that the Court in realms of less than strictest scrutiny may utilize something more than a "toothless" scrutiny. 427 U.S. at 510.

In several recent cases, a number of important but not constitutionally fundamental interests have triggered types of review somewhere between the strict scrutiny and minimum rationality standards. Thus, in Hampton v. Mow Sun Wong, 426 U.S. 88, a classification which resulted in ineligibility for employment in a major section of the economy was viewed as of sufficient

importance to be characterized as a deprivation of an interest in liberty, and was therefore accorded more than minimal scrutiny. In Vlandis v. Kline, supra, a governmental classification which affected the individual interest in obtaining a higher education at an affordable tuition was given increased scrutiny. Mr. Justice White, concurring in that opinion, stated, "(I)t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely that it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations." 412 U.S. at 459. In United States Department of Agriculture v. Murry, 413 U.S. 508, the individual interest in receiving such subsistence benefits as food stamps was accorded more than minimal scrutiny.

Additionally, in a significant number of recent cases, classifications which this Court has refused to categorize as necessarily suspect, but which are sensitive or have some of the characteristics of suspect classifications, have been accorded heightened scrutiny. Thus, classifications based entirely on sex have received critical scrutiny. In Reed v. Reed, 404 U.S. 71, where the court was considering the

statutory preference of males over females as administrators of decedents' estates, this Court held that such a classification must rest upon some ground of difference having a fair and "substantial", not just rational, relation to the object of the legislation. And in Frontero v. Richardson, 411 U.S. 677, where this Court held unconstitutional certain federal statutes which differentiated between male and female persons claiming military benefits based on dependency, the majority of the Court refused to categorize as inherently suspect the classifications based on sex but held that the discrimination was unconstitutional on the basis of Reed v. Reed. Similarly, although illegitimacy has not been pronounced a "suspect" criterion, this Court has exercised a significantly broader scrutiny that the minimum rationality standard would demand. In Mathews v. Lucas, 427 U.S. 495, involving a federal statutory distinction between legitimate and illegitimate children respecting dependency for qualification for Social Security survivorship benefits, this Court had no difficulty in finding the discrimination impermissible on less demanding standards than strict scrutiny. This Court held that statutory presumptions of dependency enacted in aid of administrative functions are permissible and need only approximate results that would occur on a case-by-case adjudication, but their lack of precise equivalence may not exceed the bounds of

"substantiality" tolerated by the applicable level of scrutiny. 427 U.S. at 509. In Trimble v. Gordon, 430 U.S. 762, this Court reviewed the cases and acknowledged that in some cases of discrimination on the basis of legitimacy it requires stricter scrutiny than that required by the minimal rationality standard, and even though it may be less than the strict scrutiny of suspect classification cases, it is not a toothless one.

Two factors occurring either alone or in combination most frequently trigger an increase by this Court of the degree of its scrutiny over that required by the minimum rationality standard. First, increased scrutiny is accorded if the interests at stake, although not necessarily fundamental, are important or of increased value and weight, or constitute an interest in liberty. Stanley v. Illinois, 405 U.S. 645; Vlandis v. Kline, supra; Hampton v. Mow Sun Wong, supra; Bell v. Burson, 402 U.S. 535, Second, increased scrutiny is accorded if sensitive, although not necessarily suspect, criteria of classification are employed. For example, discrimination on the basis of sex is not constitutional when supported by no more substantial justification than "archaic and overbroad" generalizations or "old notions" that are more consistent with role-typing that

society has long imposed than with contemporary reality. Califano v. Goldfarb, 430 U.S. 199. See also Trimble v. Gordon, supra.

B.

The District Court was not required, as it did, to treat the issue as one allowing only the deferential scrutiny of the minimal rationality standard, but could properly have applied stricter scrutiny.

The District court below, after reciting the issue in the case, stated that "[s]ince neither 'fundamental' rights nor 'suspect' classes are involved here, the distinction between Civil Service and Foreign Service employees is proper if there is a rational basis to support it." That the Court meant "minimal rationality" was specified later in the decision. "The application of the 'rational basis standard'...means that the legislatively drawn distinction is presumably valid, and that its challengers have a heavy burden in proving its invalidity. On the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny." (emphasis supplied) 436 F.Supp. at 136. As authority for the District Court's conclusion that only the most minimal scrutiny was appropriate, it cited San

Antonio Ind. School District v. Rodriguez, 411 U.S. 1, and Massachusetts Board of Retirement v. Murgia, 427 U.S. 307. The San Antonio Ind. School District case involved the financing of public elementary and secondary schools in Texas, and has very little relevance to the case at hand except that this Court there held that the case was not a proper one in which to examine the State laws under standards of strict judicial scrutiny, which test is reserved for cases involving laws that operate to the peculiar disadvantage of suspect classes or impermissibly interfere with the exercise of fundamental rights or liberties. It was held, however, that to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, such disparities are not the product of a system "that is so irrational as to be invidiously discriminatory." 41 U.S. at 54,55. This would appear to countenance a more intense scrutiny than that which would seek only a minimum rationality.

The Murgia case, on the other hand, is factually more apposite. It is, however, the contention of amici curiae that Murgia does not foreclose the application of a heightened level of scrutiny in the case at hand.

Murgia involved the constitutional validity of a Massachusetts statute which mandated that uniformed police officers

of that State be retired at age fifty. The District Court had held that it was unnecessary to apply a strict scrutiny test in that case, but determined that the age classification established by the Massachusetts statutory scheme could not in any event withstand the test of rationality. This Court agreed that "rationality" was the proper standard to apply in the case, and then stated briefly the reasons for agreeing that strict scrutiny was not the proper test for determining whether the mandatory retirement provisions denied appellee equal protection. First, the right of governmental employment is not "fundamental", and second, the class of uniformed state police officers over age 50 does not constitute a "suspect" class. This Court in this connection commented that while the treatment of aged in this Nation has not been wholly free of discrimination, such persons, unlike those who have been discriminated against on the basis of race, have not experienced a history of purposeful unequal treatment or been subject to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. It was concluded that this group of over-50 police officers was therefore not in need of "extraordinary protection from the majoritarian political process." 427 U.S. at 313. This Court then went on to hold that the Massachusetts statute was "clearly" rationally related to the purpose identified by the state. 427 U.S. at 315. This relationship was

thus identified as more substantially rational than might minimally have been required. That such greater rationality was found is reflected by the following disavowal by this Court:

> We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute. 427 U.S. at 316-317.

It thus appears reasonably clear that the right to continued public employment beyond an arbitrary age in "middle life" was viewed by this Court as an important right, but that the purposes behind the Massachusetts statute in the case of uniformed state police officers substantially justified the discrimination and therefore satisfied the heightened rationality which was required.

It is the contention of amici curiae that the right to continued employment is of such importance that its restriction justifies much more than minimum rationality scrutiny by courts in equal protection challenges. "[O]ne of the inalienable rights of freemen which our ancestors brought

with them to this country [was] the right to follow any of the common occupations of life...; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence... This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen...." Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762. "While this Court has not attempted to define with exactness the liberty ...guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes ...the right of the individual...to engage in any of the common occupations of life...." Board of Regents v. Roth, 408 U.S. 564, 572, quoting from Meyer v. Nebraska, 262 U.S. 390.

In more recent years, in Hampton v. Mow Sun Wong, 426 U.S. 88, a Civil Service regulation which denied aliens the right to hold federal jobs was considered and this Court stated, "we deal with a rule that deprives a discrete class of persons an interest in liberty...." 426 U.S. at 102, 103.

In summary, it is the contention of amici curiae that depriving any government employee of his or her job

is a significant deprivation, but one that is particularly burdensome when the person so deprived has held that job for several years and is an older person. This type of deprivation if discriminatory should be subjected to scrutiny beyond minimal rationality before being held not a denial of equal treatment of the law.

It is our further contention that persons over the age of 60, having many of the characteristics of "suspect" classifications, should be considered a sensitive discrete group and therefore entitled to heightened scrutiny when denial of equal protection is claimed. This Court, as demonstrated above, has accorded such heightened scrutiny in other non-critical classifications which have suffered past disabilities or disadvantages similar to those suffered by the elderly in our society. Thus, the role of increasingly outdated stereotypes in gender discrimination legislation has been held impermissible when such stereotypes do not accurately reflect ability (see Stanley v. Illinois, 405 U.S. 645; Stanton v. Stanton, supra). Parallel stereotypes abound concerning the logical and judgmental capabilities of older people.

14/ See, e.g., Age Stereotyping and Television: Hearings Before the House Select Committee on Aging, 95th Cong., 1st Sess. (1977).

To assume that persons beyond middle age are incapable of performing effectively in positions requiring only intellectual and logical abilities simply because some persons of like age may have such incapacity is to condemn by stereotype. Similarly, although the elderly may not have suffered such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process (see Rodriguez, supra, 411 U.S. at 28), as have certain other minorities, they have suffered and continue to suffer significant adverse discrimination in the area of employment. Congress expressly found when it passed the Age Discrimination in Employment Act of 1967, that

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing;

> and their employment problems grave;
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce. 29 U.S. Code, Sec. 621 (a); 81 Stat. 602.

That such disadvantages persist was recognized by Court in Murgia, supra, as noted above, where the Court expressly did not "make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual ...." 427 U.S. at 316.

When both factors, an "important" right and a "sensitive" classification, are present, the justification for increased scrutiny is even more apparent. See, for example, Hampton v. Mow Sun Wong, supra, where the classification was aliens and they were deprived of the right of federal civil service employment; and Stanley v. Illinois, supra, where the classification was unwed fathers and they were deprived of their right to child custody. We submit that depriving the class of elderly persons of their right to continued employment is within this group of situations.

C.

Viewed with any degree of heightened scrutiny, Section 632 fails the

test of acceptable rationality.

It would appear that the approach when analyzing cases not involving strict scrutiny, but deserving of some heightened level of scrutiny, is one adjusting the applicable level of scrutiny to match the Court's assessment of the weight and value of the individual interests involved. See, e.g., Vlandis v. Kline, supra, 412 U.S. at 459. It is therefore appropriate to articulate the relative weight and value of the interests of Foreign Service personnel that are adversely affected by mandatory retirement at age 60.

Although a great many of those affected perform clerical and other duties not peculiar to either the Foreign Service or overseas locations, appellants stress the high-level functioning of many Foreign Service Officers in arguing the need to create "room at the top" through early mandatory retirement Gov. Br. 28-29. For these top-level officers, the specific education, training and experience acquired over a period of years will serve little purpose when, perhaps for the first time in many years, the Officer is thrown onto the private job market, with few positions requiring consular and diplomatic skills. These disadvantages are severe, especially when coupled with the normal reluctance of employers to hire any strangers who are 60 years old and therefore within the societal stereotype of persons with diminishing abilities, lost adaptability,

forgotten initiative and imagination, and even failing judgment. Additionally, the psychological shock experienced in moving from a position of great responsibility, diversity and prestige, such as career positions just below that of career ambassador or career minister, to the vacuum of unemployment, must be a devastating blow. In other words, depriving Foreign Service personnel of their right to continued employment in their arduously won specialities after age 60 must be the taking of an "important" right, one that has considerable "weight and value." Surely this right is more important and valuable than the right of young men between the ages of 18 and 20 to drink 3.2% beer in Oklahoma, which was viewed in Craig v. Boren, supra, to be deserving of more critical scrutiny than that required under the minimum rationality standard.

The Foreign Service Act also has as objectives the temporary appointment to the Foreign Service of representative and outstanding citizens who possess special skills and abilities, and the permanent appointment of persons to the highest positions in the Service on the basis of demonstrated ability. 22 U.S. Code, sec. 801(6),(7). Nevertheless, the retirement system is one in which the annuity is computed on the basis of total number of years of service credit which the member has earned. Thus persons temporarily or permanently appointed to advanced positions at a

time when they had otherwise acquired special skills and abilities, at the age of perhaps 40 to 45, are able because of the mandatory retirement provision to earn only a relatively small annuity before being forced to return to non-Service pusuits. This would appear to be not only most disadvantageous to such persons but also, because of the impediment it must place in the path of recruitment of such individuals, a result contrary to the best interest of the Foreign Service itself.

This Court has not defined any type of scrutiny that is less than "strict" and yet more than that required under the minimal rationality standard. Perhaps such a definition is unnecessary because of the infeasibility of constructing an all-inclusive definition, even undesirable if we are to insure appropriate responses to differing situations. Therefore, as suggested by Mr. Justice Stevens in the recent case of Craig v. Boren, supra, this brief will assume that an "explanation of the reasons motivating particular decisions may contribute more to an identification of that standard [an intermediate standard] than an attempt to articulate it in all encompassing terms." 429 U.S. at 212.

In Hampton v. Mow Sun Wong, supra, this Court, after discussing several minor reasons that justification for the discrimination at issue in that case was

unacceptable, stated,

> Of greater significance, however is the quality of the interest at stake. Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires a rejection of the argument of administrative convenience in the case. (emphasis supplied) 426 U.S. at 115-116.

This language is almost perfectly apposite to this case. The significant public interest in avoiding the extensive deprivation of employment opportunities for the several thousand persons under the Foreign Service retirement system caused by their mandatory retirement at age 60, must be balanced against the justification put forward by appellants that such mandatory retirement is rationally related to the government interests (1) in creating advancement opportunities for younger people and (2) in removing persons not possessing the vitality necessary to carry out overseas assignments due to the effects of aging (436 F.Supp. at 136). Under this approach, instead of determining the minimum rationality of the government justifications for the early retirement, they must be given their merited weight and value so as to be fairly balanced

against the weight and value of the countervailing interests that are involved. We submit that in any such balancing process, the scales must tip in favor of the right of Foreign Service employees to continue employment in their hard-won specialities.

Massachusetts Board of Retirement v. Murgia, supra, is readily distinguishable from this case. In Murgia the persons affected, uniformed police officers, were charged with repeated and immediate duties of protecting persons and property and maintaining law and order, so that the general relationship between advancing age and decreasing physical ability to respond to the demands of the job was highly relevant and entitled to substantial weight. As was discussed in our previous argument, the assertion that there is a similar relationship between advancing age and decreasing intellectual and judgmental ability to respond to the demands of Foreign Service has not only not been proved but is at best based upon outmoded stereotypes of persons over 60. The history of membership of this Court fully belies the existence of any such relationship.

Mr. Justice Marshall in Murgia was apparently speaking for the full Court when he commented, 427 U.S. at 327, note 8, that:

> The Court's conclusion today does not imply that all mandatory

retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically fit police force, not a mentally alert or manually dexterous work force. That the Court concludes it is rational to legislate on the assumption that physical strength and well-being decrease significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental or manual ability. Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today.

Appellants argue that the principal purpose supporting the rationality of differing retirement ages for Foreign Service and Civil Service personnel is the removal from service of those whose fitness had diminished to an unacceptable level because of age and service. In support of its contention, they cite equivocal and in some cases irrelevant events in the legislative history of Foreign Service Act provisions. As we pointed out in the previous argument, several references made by appellants to debates about retirement ages and pensions are fully consistent with Congress having been primarily concerned with assuring adequate income and benefits to retired Foreign Service

personnel.

Similarly, appellants' contention that the early mandatory retirement age contributes to an abler Foreign Service is lacking in substantiation. Nowhere in the legislative history of the Act is there factual support for this premise. As noted above, it is only in recent years that Congress has begun to focus on the rationale behind mandatory retirement ages, and the consequence has been significant liberalization.

In summary, it is urged that this Court view the instant case as one requiring scrutiny more strict than that permitted under the minimal rationality standard and hold therefore that the attempted showing of rationality by the appellant does not meet the requirements of such heightened scrutiny.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

CLAUDE PEPPER
U.S. House of Representatives
Washington, D. C. 20515

EDWARD F. HOWARD
MERRILL RANDOL
Select Committee on Aging
U.S. House of Representatives
Washington, D. C. 20515

Attorneys for Amici curiae

September 22, 1978.

No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

MILLER, SINGER, MICHAELSON & RAIVES
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for *Amicus Curiae*

ALFRED MILLER,
NANCY R. WALTER,
Of Counsel.

INDEX

INDEX TO EXHIBITS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.

BRIEF *AMICUS CURIAE*

INTRODUCTION

The issue raised by this case is whether mandatory retirement statutes may rationally discriminate between "foreign service employees" (certain employees of the State Department's Foreign Service, the United States Information Agency, and the Agency for International Development) and other federal governmental employees in comparable positions. The American Association of Retired Persons, 1909 K Street, N.W., Washington, D.C. 20049, an organization whose members comprise over 11,000,000 persons over the age of 55, submits this *amicus curiae* memorandum because it regards this issue to be of enormous importance not only to the class of federal employees represented by the plaintiffs in this case, but also to all persons who may be denied their constitutional right to work as a result of mandatory retirement provisions.

The American Association of Retired Persons believes that all age-motivated retirement practices are wrong. They deprive our nation of the wisdom, experience and productivity of some of its most capable citizens. They deprive affected individuals of a right that should be limited only by ability, desire and need

and not by age, a factor which is neither an accurate nor appropriate criterion for distinguishing the abilities of workers.

Today, more than ever, the need to eliminate irrational mandatory retirement practices is crucial. There is an ever widening gap between retirement and employment income, heightened by inflation. The prospects for any substantial improvement in income status of retirees seem dim at this time. Today more than 15% of the population 65 years and ever lives in government-defined, low-income level, rock-bottom poverty. For older blacks this figure was 36.4% in 1974. Of elderly black women, the poorest of the poor, some 70.8% now live in poverty. The number of persons aged 65 and over who are below the official poverty level is estimated at over 5,000,000 and an additional 2,200,000 are classified as marginally poor (below 125% of the poverty level).[1]

We have no desire to burden the Court with repetition of arguments otherwise well made and urge the Court to consider fully the arguments made in the Appellees' brief regarding the unconstitutionality of mandatory retirement restrictions, in which we join. Our purpose herein is two-fold, to convince the Court that:

(1) Mandatory retirement cannot be justified on the grounds that its net effect is to recruit and promote younger people, and

(2) Age is not an appropriate criterion upon which to distinguish one employee from another insofar as productivity is concerned.

---

[1] Special Committee on Aging, United States Senate, "Part I, Developments in Aging: 1975 and January-May, 1976", A Report (1976) at 62-4.

ARGUMENT

MANDATORY RETIREMENT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE INTEREST. THE PROMOTION OF YOUNGER PEOPLE SOLELY BECAUSE OF THEIR YOUTH IS INHERENTLY DISCRIMINATORY. AGE IS NOT AN APPROPRIATE CRITERION UPON WHICH TO DISTINGUISH ONE EMPLOYEE FROM ANOTHER.

The notion that retirement should be based on chronological age is unique to 20th century, industrialized societies. It first became part of public policy in 1935 with the passage of the Social Security Act. This Act, which covered only industrial workers, was no more than an attempt to control the nation's 25% unemployment rate. The choice of 65 (subsequently amended to 70) as a mandatory retirement age was entirely arbitrary. At the time, there was no public debate over the concept nor were there any substantive studies as to the long range social and economic consequences of such legislation.

In 1950 the mandatory retirement concept gained widespread acceptance in the private sector. Statistics indicate how these laws have affected the national work force. In 1950 24% of those 65 and older were working. According to the U.S. Department of Labor, by 1985 that figure will have dropped to 13% even though the number of persons in that age group will have doubled by then.

The real effect of these laws over the years has been to legislate non-productivity from our most experienced employees, a result which is hardly consistent with our national pride and productivity. What we have really done is to discount one of our most valuable resources.

A mandatory retirement scheme is something our society simply cannot afford. Its overall effect has been to strip older workers of their economic independence and to force them into involuntary reliance on younger, active workers for their well-being. Income security programs in the public and private

sectors already are facing serious problems of funding. By the year 2020, nearly half of the nation's population will be below 18 or 65 and older. The prospect of a future society in which a smaller work force cares for a greater non-productive sector is very real, and very frightening.[2]

A. Mandatory Retirement can not be justified on the grounds that it promotes the advancement and recruitment of younger employees.

One of the most common purported justifications of mandatory retirement has traditionally been that its net effect results in the recruiting and promotion of younger people. The District Court, and we think rightly so, dismissed this defense as being inherently discriminatory. It said:

> "The Government presents two explanations for the retirement age distinction. It first says that the mandatory retirement age is rationally related to its interest in creating advancement opportunities for younger people. However, an interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme. . . ."[3]

Not only is youth promotion one of the most traditional justifications for mandatory retirement, it is also one of the most tenacious, and it resurfaces in other guises. In spite of the District Court's expeditious rejection of the youth promotion justification, appellants, in this instance, try to reestablish its credentials in other forms. On pages 8 and 9 of appellants' brief much is made of the "selection out" program at "all Officer levels in the Foreign Service". The selection out as described in appellants' brief does not operate at all officer

---

[2] See also, John F. McClellan's remarks, Hearings, Subcommittee on Labor, Committee on Human Resources, Hearings: *Age Discrimination in Employment Amendments of 1977,* U.S. Senate, 95th Cong., First Session, (1977) at 402-3.

[3] *Bradley v. Vance,* 436 F.Supp. 134 (D.D.C. 1977) probable jurisdiction noted, 46 U.S.L.W. 3709 (May 15, 1978) at 136.

levels, but rather at senior levels. It is really nothing more than youth promotion in disguise. The attrition takes place at the top, not equally throughout.

On page 29 of their brief, the appellants refer to the Navy's program sustained by this Court which observed at the time that the "up or out" program "results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command."[4] It is respectfully suggested that this too is youth promotion in disguise.

Appellants argue on page 31 to the effect that promotions at the upper levels of the foreign service have slowed, therefore creating difficulties in retaining competent mid-level officers and in recruiting highly qualified persons at the bottom. This is still just another way of asserting that turn-over for turn-over sake is fair and rational and should be sustained.

The mandatory retirement of competent elderly workers is really nothing other than mandatory unemployment in disguise. The theory that the retirement of the elderly creates jobs for the unemployed younger person leads to the substitution of one group of unemployed for another. As a result, a perpetual class of unemployed is created and it consists of older people who are least favored in the job market due to the same pernicious age discrimination which prompted their involuntary retirement initially.

If instead the elderly were allowed to prolong their working lives, the burdensome cost of caring for this rapidly increasing segment of the population would be reduced. Estimates have projected that by the year 2000 there will be 31,000,000 people in the United States aged 65 or more.[5] The elderly should and must be recognized as a national resource, stable, healthy and experienced contributors to the work force.

---

[4] *Schlesinger v. Ballard,* 419 U.S. 498 (1975) at 510.

[5] "The Greying of America", *Newsweek* (February 28, 1977) 50, 51-52.

The argument to the effect that mandatory retirement will reduce unemployment and promote opportunities has never been documented. On the contrary, "[a]ny contention that mandatory retirement provides job opportunities for younger employees should be severely questioned."[6] In fact there is no evidence that mandatory retirement would significantly change the composition of the work force. The reason for this is quite simply that the number of workers reaching the age of mandatory retirement in any given year is small, and the number of people both able and willing to continue working is smaller still. According to the survey data only about one in every three people will, at the point of retirement, actually elect to work.[7] Each year of course some of those individuals will decide to retire. Thus if the current federal mandatory retirement statutes were repealed, the change in the federal work force—which accounts for 2.3 million people—would be less than one-half of one percent over the next five years. Only 1.2% of the federal work force is now between 65 and 70. That represents approximately 30,000 people. Assuming only one in three stay on past age 70, only 2,000 people each year would exercise the choice to delay retirement.[8]

In testimony before the Labor Subcommittee of the Senate Committee on Human Resources, Representative Paul Finley (Republican of Illinois) rejected the youth promotion argument as follows:

> "A related objection to ending mandatory retirement is a fear that it might worsen unemployment. Our present system, however, of forcing retirees to give their jobs to

[6] Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans,* 44 Southern California Law Review, 150, 179 (1971).

[7] *Age Discrimination in Employment,* Hearing of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st Session (1967) at 383.

[8] Age profile information obtained from Maxine Barron, Chief Special Employment Program Support Section, Manpower Statistics Division, U.S. Civil Service Commission. (1977)

younger people simply trades one form of unemployment for another. Nor does depriving older and still capable Americans of jobs in order to provide them for the young make any more sense than discriminating in employment against blacks, women or religious or ethnic minorities. The latter is clearly against the law, and so should the former be.

"Our economy will absorb new workers as it has repeated waves of immigrants in the past. The maturing of World War II baby boom has passed. Estimates are that after 1978, 30 percent fewer people will enter the labor market than in the period between 1967-1977.

"In addition, according to one estimate, mandatory retirement costs the United States economy over $10 billion each year by forcing skilled workers out of factories and offices creating unnecessary job turn-over and retraining expenses. If this money could be saved, it could be put toward the creation of new jobs thus increasing total employment instead of retraining the young to take the place of those forced to retire."[9]

In answer to the question "Would raising the upper limit of ADEA cause unemployment to rise?", a spokesman for the Center on Work and Aging, American Institutes for Research, Washington, D.C. replied:

> "To the extent that more persons, protected by ADEA from mandatory retirement remained in the labor force, they would be part of the supply of available workers. In the absence of any improvement in economic growth rates, demand would remain the same.
>
> "In the aggregate, therefore, unemployment could look higher. But some of the unemployment would be shifted to other groups whose average duration of joblessness is less (given the positive relationship between dura-

[9] Hearings, *Age Discrimination in Employment Amendments of 1977,* supra, at 140-141.

tion and age) and to people who would share the burden of that unemployment more equitably with older workers rather than have them bear that burden (mandatory retirement) as they do now, to the benefit of non-older workers.

"Further, involuntary retirement now masks the forced withdrawal from the labor force by older workers pushed out by discriminatory practices. Enumerated as not in the labor force, they are not counted as unemployed even though they want to continue working. Depending on their response to survey enumerators, some are listed as discouraged workers, some as simply retired. In that sense, the official unemployment rate masks part of the unemployment of involuntary retirement."[10]

The Director of the New York State Office for the Aging has vigorously contested the notion that forced retirement makes way for younger workers:

"This idea fails to take into consideration the fact that by allowing older people to remain in the work force, society gives them the chance to earn income which in turn increases their buying power and the overall demand for consumer goods. This, of course, increases the demand for labor. Thus, keeping older people employed may in fact open up more jobs for younger people than does the use of mandatory retirement."[11]

A recent study completed and published by Banker's Life and Casualty Company (1978) (one copy of which has been logged in the Office of the Clerk of the Court) shows how the elimination of mandatory retirement provisions affect the employee composition of the given company. The text and tables on pages 5 and 7 thereof show that although many employees

[10] Id. Marc Rosenblum, at 86-87.

[11] Testimony by Lou Glasse, Director, New York State Office for the Aging, hearings on mandatory retirement, New York State Assembly, Committee on the Aging, New York, New York, January 21, 1977.

upon reaching the age of 65 choose in fact to continue working, many other employees choose to retire before the age of 65, balancing out therefore those who decide to stay. As a result the company has not become "top-heavy" with employees 65 and over, and there has been ample opportunity for younger workers to advance.

B. Age is not an appropriate criterion for distinguishing employees' abilities.

Scientific studies have consistently demonstrated that age is not a suitable criterion for distinguishing employees' abilities. Studies of older employees indicate that their performance is rated as good or superior to younger workers in almost all respects, that there is no set pattern of the decline in intellectual productivity and indeed that many persons have increased productivity in their seventies, eighties and nineties.[12]

One of the most recent reports on employees' productivity appears in the Banker's Life and Casualty Company report (supra). Its studies have shown that facile comparisons of absenteeism, health, productivity and performance between age groups are impossible to document.

[12] *See generally, Age Discrimination in Employment: The "Problem" of the Older Worker,* 41 N.Y.U.L. Rev. 383, 396-8 (1966); Note, *Too Old to Work, the Constitutionality of Mandatory Retirement Plans, 44 So. Cal. L. Rev. 150, 159-61 (1971);* Petersen, "Older Workers and Their Job Effectiveness," in *Gerontology* (C. B. Vedder ed. 1963); Green, "Age, Intelligence and Learning," *Industrial Gerontology,* No. 12, Winter 1972, at 29-40; Nevil Tronchin-James, *Arbitrary Retirement* (1962), particularly chapters 7 and 8; Baltes and Schaie, "The Myth of the Twilight Years," *Psychology Today* 35 (March 1974); Sheppard, *Towards an Industrial Gerontology* (1970); "Comparative Job Performance of Office Workers by Age," *Monthly Labor Review,* January 1960, at 39; Special Committee on Aging, United States Senate, "Improving the Age Discrimination Law," a Working Paper (1973) at 15; Christensen, "Interference in Memory as a Function of Age," XXIX *Dissertation Abstracts* 2216-B (1968); Szafran, "Psychological Studies of Aging in Pilots," 40 *Aerospace Medicine* 543 (1969); *Age Discrimination in Employment,* Hearings of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 370-71 (1969).

Dr. James Birren, Director of the Gerontology Center at the University of Southern California has analyzed the change in intellectual capacities in later life as follows:

> "Because of my research background I have been involved in several policy discussions during my career about the use of chronological ages as an index for retirement. This has involved a role as a consultant to the Federal Aviation Agency with regard to commercial airline pilots, United States Army, and other groups. My own research has borne out the fact that given good health there is little change in intellectual capacities in later life, i.e. decrements in ability occur when an individual has suffered a change in health, but not because of intrinsic processees that could be identified with chronological age or aging."[13]

In a working paper prepared for use by the Special Committee on Aging of the U.S. Senate (August, 1977), the arguments against mandatory retirement are summarized as follows:

> "1. Chronological age alone is a poor indicator of ability to perform on the job. Mandatory retirement at a fixed age does not take into account a worker's abilities and capacities which vary sharply from individual to individual. . . .
>
> "2. Mandatory retirement is based, to a certain degree, upon a misconception that older workers do not perform as well on jobs as younger persons. However, several studies indicate that they perform as well as their younger counterparts and in some cases notably better. . . .
>
> "3. Mandatory retirement can cause financial hardship for older persons. Many elderly individuals need to work because social security benefits are inadequate.

[13] Birren, *Increments and Decrements in the Intellectual Status of the Aged,* Psychiatric Research Report 23, at 207, 213 (1968).

Mandatory retirement can also cause lower social security benefits if the last years of the employee's job should produce higher earnings than the earlier years. It can also be disadvantageous for women who oftentimes have an in-and-out work pattern. Compulsory retirement limits their working years which in turn can reduce their ability to build up pension benefits.

"4. Mandatory retirement can have adverse physical and psychological effects. . . .

"5. Compulsory retirement increases the cost of income maintenance programs such as social security. It also adds to the cost of private pension programs.

"6. Forced retirement is based upon the myth that older workers must 'make way' for younger workers. . . .

"7. Another myth is that retaining a worker past the normal retirement age automatically increases an employer's pension costs. There are several options available to prevent any increases in pension costs. For example, workers remaining past the normal retirement date can receive the same dollar benefit upon actual retirement that they would have received if they had retired on the normal date."[14]

We subscribe to all of the foregoing arguments and request this Court to give them the consideration they deserve. We would hope that as a result of the decision in this case, one more form of discrimination, namely, age discrimination in employment, will disappear.

[14] Hearings, *Age Discrimination in Employment Amendments of 1977,* supra, at 39-41.

CONCLUSION

FOR THE FOREGOING REASONS AMICUS CURIAE RESPECTFULLY URGES THE COURT TO AFFIRM THE DECISION OF THE DISTRICT COURT.

Respectfully submitted,

MILLER, SINGER, MICHAELSON & RAIVES
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for *Amicus Curiae*

ALFRED MILLER,
NANCY R. WALTER,
Of Counsel

Dated: September 22, 1978
New York, New York

EXHIBIT A.

Consent of Parties Obtained.

OFFICE OF THE SOLICITOR GENERAL

WASHINGTON, D. C. 20530

(SEAL) June 2, 1978

Nancy R. Walter, Esq.
Miller, Singer, Michaelson
& Raives
1909 K Street, N.W.
Washington, D. C. 20006

Re: Cyrus R. Vance, Secretary of State, et al. v. Holbrook Bradley, et al. (October Term, 1977—No. 77-1254)

Dear Ms. Walter:

I hereby consent to the filing of a brief *amicus curiae* in the above-captioned case by Alfred Miller, Esq., on behalf of the National Retired Teachers Association and the American Association of Retired Persons in the Supreme Court.

Sincerely,

/s/ WADE H. MCCREE, JR.
Wade H. McCree, Jr.
Solicitor General

cc: Alfred Miller, Esq.
Miller, Singer, Michaelson
& Raives
555 Madison Avenue
New York, New York 10022

LETTERHEAD OF BRUCE J. TERRIS

June 24, 1978

Ms. Nancy R. Walter
Miller, Singer, Michaelson & Raives
555 Madison Avenue
New York, N. Y. 10022

Re: Vance v. Bradley, No. 77-1254

Dear Ms. Walter:

In response to your letter of May 24, 1978, this is to advise that appellees have no objection to the filing of an amicus brief by counsel for the National Retired Teachers Association and the American Association of Retired Persons on the above-referenced appeal.

Very truly yours,

/s/ EDWARD H. COMER
Edward H. Comer